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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 217

CLINTON FOODS, INC., a Delaware Corporation,
Petitioner,

v.

MARVIN YOUNGS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on April 17, 1959.

OPINION BELOW.

The opinions of the Court of Appeals for the Eighth Circuit (T. R. 84-101) are reported at 266 F. 2d 116.

JURISDICTION.

The judgment of the Court of Appeals was made and entered on April 17, 1959 and a copy thereof is appended hereto in the Appendix, at p. 27. Rehearing was denied by order entered on May 11, 1959 (T. R. 114). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

Respondent sought and recovered damages for injuries allegedly incurred by reason of negligence of petitioner. Jurisdiction of the Federal District Court was based upon diversity of citizenship. Petitioner sought and was denied Judgment Notwithstanding the Verdict, and appealed urging that its duty to respondent, an employee of an independent contractor, was limited to refraining from any act which would render its premises unsafe and warning respondent of any dangers known to it but unknown to him.

In the trial court, and on appeal, petitioner urged that it should have received a directed verdict, contending that it was not negligent for three reasons: (1) respondent was or should have been aware of the danger; (2) he was warned personally of the danger; and (3) his employer was warned of the danger.

A division of the Court of Appeals reversed on July 15, 1958 (App. 28-40). Respondent sought, and was granted a rehearing which was presented to another division which did not pass thereon. The matter was ultimately presented to the Court of Appeals, sitting en banc, which affirmed the majority opinion, holding that jury questions existed as to whether respondent knew of the danger and whether he was personally warned (App. 21). The majority neither

mentioned, nor determined the effect of, the contention that Respondent's employer was warned of the danger. The questions presented are:

1. Whether the Court of Appeals can ignore a contention which, if decided in favor of petitioner, would be determinative of its right to reversal irrespective of the validity of its other contentions.

2. Whether a party has been accorded due process of law where such a contention has not been passed upon.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

Constitution of the United States, Amendment V, the pertinent provision being: "No person shall * * * be deprived of * * * property, without due process of law * * *".

Title 28, U. S. C. 1652, which provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

STATEMENT.

Respondent was an employee of an independent contractor which had been engaged to lay a pipe line on petitioner's property. He was injured when he came in contact with a wire leading into a transformer in an outdoor substation through which the pipe was to run. Petitioner contended that it had warned respondent personally and had warned his foreman; that the foreman had warned respondent; and that the enclosed substation bore a number of signs warning of the danger. Respondent admitted

seeing warning signs and that he had worked around electricity before and was aware of the danger in transformers. Petitioner further relied upon the foreman's testimony that he knew of the danger (R. 20; 21). The jury returned a verdict for respondent on September 13, 1956 (R. 52). The trial Court overruled petitioner's Motion for Judgment Notwithstanding the Verdict on June 20, 1957 (R. 55, 56), and appeal was taken.

On July 15, 1959, the division which first heard the appeal filed opinions, later withdrawn, reversing 2 to 1, the reversal being based upon respondent's personal knowledge of the danger and upon warning to him. The division of three different judges who heard the subsequent reargument, on its own motion set aside the submission and filed no opinion. The Court en banc, having heard further argument, affirmed the trial Court on April 17, 1959 (App. 11). In the latter decision, the majority purported to enumerate the petitioner's contentions as two fold and involving only the claim that respondent personally knew of the danger and the claim that the warnings satisfied any legal duty of petitioner (App. 21). It did not discuss or determine the contention that the foreman was warned, and admitted knowing of the danger, and that petitioner was therefore, as a matter of law, not negligent. Petitioner filed a Petition for Rehearing which was denied on May 11, 1959.

Portions of petitioner's briefs in the Court of Appeals are appended hereto because neither the Record nor the Transcript of Record establishes the fact that the contention relating to the employer's knowledge was urged throughout the appeal.

Petitioner consistently contended, in its original Brief (App. 50, 60, 62, 68-77, 81), in its Reply Brief (App. 90, 97, 99, 100), in printed Arguments following the withdrawal of the original opinion (App. 104, 106, 107, 108, 113,

114, 115, 118, 119-122), and at each of the three oral submissions, that the foreman was warned and had acknowledged warning and knowledge of the danger, and that this constituted a complete defense. It reiterated its argument on these points in its Petition for Rehearing (App. 125, 126-129).

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals should be reviewed because:

1. Petitioner has not been accorded determination of a point of law which, if decided in its favor, would be determinative, and has thus not been accorded its day in court.

2. Public interest requires that those who engage independent contractors should be apprised of any rule prevailing in the Eighth Circuit which will deprive them of the defense relied upon by petitioner.

The Court of Appeals held that under Iowa law the duty of petitioner was limited to warning of latent perils (App. 18, 19). If, as contended, warning to the employer discharged the duty, or, because of the employer's knowledge of the peril no duty was imposed, the petitioner was entitled to reversal unless a jury could properly have decided that the employer was not warned and did not know. The foreman acknowledged both warning and personal awareness of the danger (App. 20-21), and the jury could not properly have found otherwise. Therefore, a decision in favor of the petitioner on the legal question would have determined the matter in its favor, irrespective of whether jury questions existed as to respondent's personal knowledge or warnings to him.

Due process and the provisions of Title 28, U. S. C. 1652, require that this question be determined, whether for or

against petitioner, and this is true even though, as hereinafter appears, the Iowa Courts have not passed upon it specifically and it is difficult of determination.

In **Huddleston v. Dwyer**, 322 U. S. 232, this Court, after holding that state law controlled in the case, said:

> "It is the duty of the federal appellate courts, as well as the trial court, to **ascertain and apply** the state law where, as in this case, it controls decision." (Emphasis supplied.)

In **Bernhardt v. Polygraphic Company of America**, 350 U. S. 198, the Court of Appeals had failed to decide applicable state law under the erroneous impression that federal law governed the issue involved.

Mr. Justice Douglas, in delivering the opinion of this Court, pointed out that a federal court enforcing a state-created right in a diversity of cases is "only another court of the State" and may not "substantially affect the enforcement of the right as created by the State."

Mr. Justice Frankfurter, in a concurring opinion, discussed the fact that difficulty in determining the applicable state law does not overcome the considerations which dictate that it must be determined, as follows:

> "* * * One of the difficulties, of course, resulting from Erie R. Co. v. Tompkins, is that it is not always easy and sometimes difficult to ascertain what the governing state law is. The essence of the doctrine of that case is that the difficulties of ascertaining state law are fraught with less mischief than disregard of the basic nature of diversity jurisdiction, namely, the enforcement of state-created rights and state policies going to the heart of those rights. * * *"
>
> "As long as there is diversity jurisdiction, 'estimates' are necessarily often all that federal courts can

make in ascertaining what the state court would rule to be its law. * * *"

Thus it appears that the difficulty which would face the Court of Appeals in deciding what the Iowa law is on this question does not relieve it of the duty to do so in this case.

In many instances a case can be decided without determination of all of the points raised. As an example, in this case we urged that the employer was guilty of intervening negligence which was the proximate cause of the injury. The holding that the jury could have found that negligence of the petitioner was the proximate cause eliminates this contention because any negligence of the employer would have been only concurrent therewith, and the Court, holding as it did, quite properly failed to discuss whether or not it existed. We are in complete accord with the view that federal Courts should avoid determination of state law where it is in doubt and **where it is unnecessary in order to decide all critical issues.**

Here, however, determination of the law of Iowa is vital. Petitioner's contentions were not interdependent, but each, standing alone, if sound, would be determinative. Had petitioner not raised any question as to respondent's personal knowledge or as to having warned him personally, it would nevertheless be entitled to reversal if the contention in question had been ruled upon in its favor. The failure to do so is tantamount to a situation wherein only this point has been raised and the Court of Appeals refused to hear the appeal or refused to decide it.

The law of Iowa imposing and limiting the duty having been stated by the Court of Appeals, and the opinion being devoid of any holding that knowledge of, or warning to, the employer does not discharge it, one who finds himself in the position of this petitioner will be misled as to what his obligation is.

White's Supplement to Thompson on Negligence, Sec. 979, states the rule as follows:

> "It is the rule that the owner of property owes to an independent contractor **and his servants at work thereon** the duty of exercising reasonable care to have the premises in a safe condition for the work, unless the defects responsible for the injury **were known to the contractor.**" (Emphasis supplied.)

In Engle v. Reider, 366 Pa. 411, 77 A. 2d 621, the Court considered an instruction which it quoted as follows:

> "The extent of the duty of the owner of the building who employs an independent contractor to the latter's employees (that is, Routman's employee, Engle) with respect to known or discoverable dangerous conditions existing on the premises where the work is to be done, is to warn the contractor of their existence; **he is not required to warn every subcontractor and laborer who comes on the premises.** In this case, * * * the **Reiders had no obligation to warn Engle, an employee of Routman.** His full duty was performed with regard to this dangerous condition when he warned the contractor Routman. If you find that he did warn the contractor Routman; or, if you find that Routman did not need to be warned because of his superior knowledge of the danger of unvented flues, or because of his having visited the premises five or six times he saw, or ought to have seen this obvious danger and realized it—and he says he did—then Reider's full duty to those business visitors, Routman and Engle, was to notify Routman, or be sure that Routman knew of the existence of this condition which was dangerous; and if he had done that he did not need to go farther; **he did not need to go as far as to notify Engle.**" (Emphasis supplied.)

The Pennsylvania Court approved this instruction and others as being "in complete accord with the law of Penn-

sylvania", citing three cases and the section of White's Supplement set out supra.

In **American District Telegraph Co. v. Kittleson**, 179 F. 2d 946, the Court of Appeals for the Eighth Circuit held that the Iowa cases support an instruction, objected to, **not** by the property owner, but by the defendant employer, who stood in the shoes of the plaintiff in an action over, which instruction read in part:

> "You are instructed that if you find that the condition of the skylight in question did present a hidden defect, danger or pitfall to persons using the roof, and Armour & Company knew, or in the exercise of reasonable care, should have known, of such condition and should have reasonably expected that the defendant's employees would use said roof in the performance of their duties then the failure to warn the defendant **or** its employees of such hidden defect, danger or pitfall constituted negligence. * * *" (Emphasis supplied.)

In numerous cases involving owner-invitee relationships, the Iowa Supreme Court has held that a warning to a lessee discharged all obligation on the part of the owner to warn the lessee's invitee, notwithstanding the fact that the invitee was also an invitee of the owner.

A lawyer, called upon by the owner of property to express his opinion as to the owner's liability to the employees of an independent contractor, would, after researching the question, doubtless inform the owner that, in the absence of affirmative negligence, his obligation would extend only to being sure that the contractor is aware of any hidden peril, and would perhaps suggest that the owner procure the contractor's written acknowledgment of his awareness of the danger. Study of the decision in this case would not cause him to doubt his opinion.

Certainly the public interest demands that lawyers and, in turn, their clients who engage independent contractors

be warned of the apparent position of the Court of Appeals. It is hardly just that one should reach the Court of Appeals before learning that the knowledge of the contractor—irrespective of the evidence thereof—is no defense to him despite the general rule that it is.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

COURT OF APPEALS OPINION FILED APRIL 17, 1959.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,887.

Clinton Foods, Inc., a corporation, Appellant,

vs.

Marvin Youngs, Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[April 17, 1959.]

Craig Cook and Wayne G. Cook (Cook, Blair, Balluff, Wedean & Nagle, were with them on the brief) for Appellant.

Carl H. Lambach (Margaret Stevenson; Isador Katz; Lambach, Stevenson & Dircks; and Reidy, Katz, McAndrews, Durkee & Telleen, were with him on the brief) for Appellee.

Before Gardner, Chief Judge, and Sanborn, Woodrough, Johnsen, Vogel, Van Oosterhout, and Matthes, Circuit Judges.

Matthes, Circuit Judge.

In this diversity case, Marvin Youngs, plaintiff below, employee of contractor engaged in work on defendant's

premises, obtained a jury verdict and judgment for $80,000, as damages for personal injuries received from electrical shock. Clinton Foods, Inc., defendant below, filed timely motions for directed verdict and for judgment notwithstanding the verdict, which were denied, and this appeal followed. We shall refer to the parties as designated in the trial court.

We have for determination the sole question of whether, under the evidence, the jury could properly find that the defendant negligently failed to give adequate and sufficient warning in view of the circumstances existing when plaintiff was injured. Since the primary question is focused upon the sufficiency of the evidence, defendant cannot prevail unless it is determined that there was no reasonable basis upon which findings of negligence and defendant's ultimate liability for plaintiff's injuries could be based. See **Gowing v. Henry Fields Co.**, 225 Ia. 729, 281 N.W. 281, 283, where the court stated:

> "In passing on defendant's motion to direct a verdict, the plaintiff is entitled to have the evidence considered in the light most favorable to him. • • • 'Every inference reasonably permissible in support of the issue should be carried to the aid of the evidence.' **McWilliams v. Beck**, 220 Iowa 906, at page 909, 262 N.W. 781, at page 782."

See also, **Egan Chevrolet Co. v. Bruner**, 8 Cir., 102 F.2d 373, 377, 122 A.L.R. 987. The case rests upon this factual foundation:

Defendant, as the owner of a food processing plant at Clinton, Iowa, entered into a contract in 1953 with Pittsburgh Piping and Equipment Company, plaintiff's employer, for the installation of a new turbine on defendant's property. In order to effectuate the installation, Pittsburgh was required to lay a 20-inch pipe line on the premises of defendant. The controlling plans and specifications,

as prepared by defendant, required that the pipe line be laid on and along a portion of defendant's property which was enclosed. In the enclosed area were two banks of electrical transformers. A photograph and other evidence reveal that one set of transformers, referred to as "emergency transformers," has the appearance of three cylindrical objects of metal, approximately 4 feet in height, with insulated electric wires leading into and out of the top of each cylinder. These "emergency transformers" were resting upon a concrete foundation, the top of which was approximately two feet above the surface of the adjacent ground. It also appears that defendant had its own power plant and generated its own electrical energy, but to ward against a possible power failure in its own plant, electric energy was obtained from the Interstate Power Company, and such energy was transmitted through the emergency transformers. Although they did not feed current into defendant's plant, except on the rare occasions when defendant's own power plant failed, the emergency transformers were, in the words of its mechanical engineer, "kept live all the time because they would all cut in. They were not serving any purpose other than in those rare times." However, the same witness testified that the cylindrical case around each transformer was not "live." "They are grounded out so there is no danger in touching them." Electric current was brought into the emergency transformers by a "feed-wire." This is the wire which plaintiff came into contact with and which caused his injuries. It carried from 6,900 to 13,200 volts, and was mounted vertically along the frame supporting the transformers. This wire was covered with insulation. With reference thereto, we have this information from a Mr. Shannon, defendant's mechanical engineer:

> "The wire coming down to the rear on Plaintiff's Exhibit 5, is the one—the high tension line. It is also shown on Exhibit 3. It comes down and is fastened to

an insulator. Loops out here and then goes up into the transformer. Here is disconnecting switches there. • • • The wire that comes down out of this insulator was covered with an insulating substance, but it wasn't insulated for that purpose. It happened that it was the right sized wire and they used it. It isn't customary to insulate that tension of wire and wasn't put there for insulation purpose. Normally that wire would be bare because for purposes of insulation, that insulation was absolutely worthless—might just as well not be there."

By the same witness, it was further developed that there was a switch whereby the current could have been cut off from the emergency transformers, but it was not the practice of defendant to open the circuit switches and cut off the current. The defendant's Superintendent of Power in his testimony explained the reason why the defendant considered it necessary to keep these transformers constantly energized, and, among other things, said: "A very temporary shutdown of the emergency transformer, such as 5 minutes, could have endangered our plant."

The current generated by defendant's plant was fed through the other set of transformers mentioned, which were located about twelve feet from the emergency transformers. These transformers, known as "step-down" transformers, carrying 440 V. were not encased, and were described as "corrugated, cylindrical objects," with an exposed bus bar to the rear of them.

In installing or laying of the water main, it was necessary to first dig a ditch near both sets of transformers, described above and it was while the crew of Pittsburgh's men were engaged in laying a section of the water main in the ditch near the emergency transformers, that plaintiff came in contact with the lead-in insulated wire before described. At that time, plaintiff was required to work on

an artificially raised ground level in, closer than usual proximity to the emergency transformers and lead-in wire. The events surrounding and immediately preceding the occurrence were described by Pittsburgh's foreman, Edward Morgan, in this manner:

> "I saw Mr. Youngs immediately before he got hurt. I was standing on one of the dirt piles north of that emergency transformer bank, facing towards the slough.
>
> "We were putting this piece of pipe in the ditch, and we had a chain fall on this timber over the center of the ditch. We had a rope snubbed on each end of the pipe and Sullivan and I was on the one end and we had it snubbed around a telephone pole, and the other boys, two of them were on the other one or one of them was, or one on the chain fall, I don't remember. I know I was on the one line that was around the telephone pole, and we was holding the pipe back snubbing it while it was being dragged in the ditch by the chain fall with the fellow on the chain fall and as the pipe swung in the ditch and settled down I looked up, turned to the pump house and looked up and Bud (Youngs) was taking a step or was going off that plank, as I see it, off the plank towards the pump house, and the only thing I think he was going, he was going over to the ladder next to the pump house to go down the ladder to help land the pipe in the ditch. As he stepped in that direction I saw a big flash and a drop of—like a drop in power or short, and that was it • • • Bud fell back I would say north away from the pump house, and he fell and his shoulders hit across the timber we had across the ditch and his arm fell over the top of the timber and his head, or whichever you want to call it, head or neck, maybe a difference of opinion there, rested up against the angle iron on the corner of that transformer bank. The dark end spot on the angle iron, as it appears on

Plaintiff's Exhibit 3, is where his head or neck was resting—that burned spot."

The record also establishes that the defendant actively supervised the installation of the project and particularly the laying of the water main. Mr. Shannon, defendant's engineer, testified: "[t]he laying of the water main along the bank on the property was directly under my charge," and "[i]t was my particular job to see that that pipeline was in accordance with specifications * * *."

On the warning issue. There were several signs in and on the enclosure displaying the words "Dange 13,200 Volts." One of these signs was on a pole approximately six feet from the place where plaintiff came in contact with the wire, and the other signs were on the fence enclosing the area. As to oral warnings, there is decided conflict and dispute. However, there was unequivocal testimony from which a jury could find that all oral warnings given by defendant were directed to the open, corrugated transformers and the 440 Volt bus bar, and that there was a total failure to warn of the danger lurking in the lead-in wire to the emergency transformers. On this issue, plaintiff testified:

"We had worked intermittently about 5 days in the area. At the time that they first discussed going through that enclosed area with a pipe line, several of the boys and myself discussed whether or not that was a wise idea. Of course we don't design the jobs nor is it our place to say where it goes. Our job is to do it. We discussed that, and the only information or warning that I ever got was the fact of an exposed bus bar at the far end. That came up at the time when Mr. Owen and Mr. Johnson were laying out elevation lines in the ditch itself, for the excavation of the ditch. That was the incident to which Mr. Morgan testified yesterday. I had never received any warning

of any kind to indicate that the wire you are pointing out which runs down a steel flange to what appears to be the rear of transformers that have been identified as emergency transformers, present any unusual hazard. We had not been warned that the wire was the equivalent of a bare wire carrying 13,000 volts. Had it been bare, we wouldn't have gotten within 3 foot of it.

"At no time, prior to October 9, when I was injured as others have described, did I ever hear any discussion from anybody, either my employer or Clinton, of an offer of rubber mattresses or any other safety devices to shield us against any dangers. I can best answer your question as to whether I was aware of any dangers other than the bus bar that might have required such protection, by saying that transformers ordinarily are dangerous, but it is primarily the wiring above the transformer—high up out of reach—and, as a matter of fact, all of the high voltage wires I have ever seen have been bare wires when they come in a transformer area. From the picture, that wire was covered."

The testimony of Mr. Shannon, defendant's mechanical engineer, as to the warning imparted by him, reduced to narrative form, is:

"As nearly as I remember, I said, loud enough so that any of the workmen could hear, and purposely so, 'Watch out for those transformers. They are hot and they will bite.' That was the nature, character and phraseology, in substance, as near as I can remember. I went into detail about it once over by the pumphouse where it was 440 volts [the open corrugated transformers], and where they were throwing dirt up there. I said, 'Now, you are getting where that is dangerous. You can walk right into that and if you do it will bite.' In that situation I specifically pointed out the bus bar because they had piled the

dirt so high you could walk right into it. I don't know who was present when I said that. I didn't pay any attention to the particular men."

Another witness, a former employee of Pittsburgh, stated: "We had been told that the only thing we had to worry about was the bus bar. It was Eddy (Mr. Morgan) told us. I don't know who told him. Nothing specific otherwise was called to my attention." And finally, Mr. Hartmann, electrical engineer for defendant, gave this version:

> "In my dealing with Mr. Muter I knew that he was going to be working in this danger area, and I therefore told him on several occasions that he should be careful as the conditions in there would warrant and, at the time he first started digging in there I warned him that there was a possibility of someone getting in contact with the open bus on the 440-volt transformer and the answer I received was, 'Well, no one has up to this time.'"

It stands conceded that plaintiff as an employee of an independent contractor, was a business invitee. The Iowa law, which controls here, in respect to the duty owed by the owner of premises to an independent contractor or an employee of such contractor, is clearly stated in **Gowing v. Henry Field Co.**, 225 Ia. 729, 281 N.W. 281, at page 284, in this language:

> "The only duty owing by the defendant to the plaintiff as an independent contractor was that of exercising reasonable care to promote his safety. Plaintiff was an invitee **and it was defendant's duty to warn him of any danger in and about the premises which he knew of or in the exercise of ordinary care ought to have known of and of which plaintiff was not aware or which in the exercise of ordinary care on his part would not have been discovered. Steele v. Grahl-Peterson Co.**, 135 Iowa 418, 109 N.W. 882.

"Defendant was not responsible to plaintiff as an independent contractor for injuries from defects or dangers which the contractor knew of or ought to have known of, **'but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this, he is liable for resultant injury.' Douglass v. Peck & Lines Co.**, 89 Conn. 622, 95 A. 22, 25; 44 A.L.R. 894, note; **Arizona Binghampton Copper Co. v. Dickson, Adm'r**, etc., 22 Ariz. 163, 195 P. 538, 44 A.L.R. 881." (Emphasis supplied.)

More recently, in *Atherton* v. *Hoenig's Grocery*, 86 N.W.2d 252, 255, the Supreme Court of Iowa re-announced the principle that an owner of premises is under a duty to warn an invitee of any danger of which the owner was aware and of which the invitee was unaware.

With the law in this posture, the crucial question is—Do the facts establish, as a matter of law, that plaintiff was adequately warned or was aware of the dangerous instrumentality which caused his injury, or in the exercise of ordinary care on his part, could he have discovered such danger? Viewed in light of all of the circumstances, if the factual situation is such that reasonable minds could differ as to whether the warning given was adequate and sufficient, then we must resolve the issue in favor of plaintiff.

One important circumstance to consider is that here, unlike the situations in **Gowing** and **Atherton**, we are concerned with the dangerous agency of electricity. This circumstance does not necessarily change the legal duty imposed upon one in charge of the dangerous element, but it is abundantly clear from the expression of the courts dealing with Iowa law on the subject, that the character of the instrumentality must be taken into consideration in

determining whether those in charge thereof have in fact exercised reasonable or ordinary care. Thus, this court stated in **Yarn v. Ft. Dodge D.M. & S.R. Co.**, Iowa, 1929, 31 F.2d 717, 718, cert. den. 280 U.S. 568, where the employee of a mining company, which was furnished electricity by defendant, was injured while removing a steam pipe in close proximity to bare high tension wires:

> "The defendant is not an insurer; like all others, it is liable for failure to exercise reasonable care **under the circumstances.** But the care required of one installing 22,000 volt wires is different from that required of one installing steam pipes, just as the mythical 'reasonable man' must drive a car loaded with cans of nitroglycerine more carefully than he need drive the same car loaded with cans of milk." (Emphasis supplied.)

In **Iowa-Illinois Gas & Electric Co. v. Young**, 8 Cir., 179 F.2d 485, 489, Iowa, 1950, this Court was required to pass upon the propriety of the trial court's instruction in which the jury was told that in determining the question of whether defendant was negligent—

> "'* * * it is proper for you to consider, together with all the other facts and circumstances, that the handling of electricity is a matter that requires skill and understanding of the dangers thereto; that a current of electricity of high voltage is a dangerous and deadly element traveling through and along wires and other conductors without being visible or easily detected; **and a person who deals in it and handles such an element is bound to use a degree of care commensurate to the dangers involved to protect others from harm.**'" (Emphasis supplied.)

In approving this instruction, this Court, speaking through Judge Woodrough, stated at page 489:

"We think the submission of the issue of defendant's negligence on the instructions given is supported by the decisions of the Supreme Court of Iowa and the law of Iowa as declared by this Court. **Reynolds v. Iowa Southern Utilities Co.**, supra [21 F.2d 958]; **Yarn v. Ft. Dodge, Des Moines & Southern Ry. Co.**, 8 Cir., 31 F.2d 717; **McKiddy v. Des Moines Electric Co.**, 202 Iowa 225, 206 N.W. 815."[1]

Defendant's position is two-fold. First, it is urged that because plaintiff was aware that the enclosure in which he and others were working contained 13,200 volt equipment, coupled with his general knowledge that transformers are used to conduct electricity, completely relieved defendant of the duty to give any warning of the danger in and about the emergency transformers. Second, it is said that the warnings imparted by the signs bearing the legend "Danger 13,200 volts," coupled with the verbal statements made from time to time that the area was "hot," completely satisfied any legal obligation with respect to warning so as to remove that issue, as a matter of law, from the case. We are not persuaded to accept either contention.

Reviewing the case in the most favorable light, we find that while there was evidence that knowledge had been imparted to employees of Pittsburgh that the enclosed area was "hot," logically, it can hardly be urged that the entire area was literally charged with electricity, or that Pittsburgh's employees should believe it to be so. Indeed, defendant itself recognized that such was not the situation, for it prepared the plans whereby it became necessary to

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[1] See also Beman v. Iowa Elec. Co., 205 Ia. 730, 218 N.W. 343, 345; Knowlton v. Des Moines Edison Light Co., 117 Ia. 451, 90 N.W. 818; Reynolds v. Iowa Southern Utilities Co. (Iowa), 8 Cir., 21 F.2d 958; Loveless v. Town of Wilton, 193 Ia. 1323, 188 N.W. 874, 877; Toney v. Interstate Power Co., 180 Ia. 1362, 463 N.W. 394, 397.

lay the water main through the area. By so doing, and by directing a specific warning only to the open, uncased, corrugated transformers and the 440-volt bus bar adjacent thereto, the jury could properly find that, implicit in defendant's "invitation" to work within the area was the representation that the area was relatively safe, except around the dangerous instrumentality; i.e., the uncased transformers and bus bar. That the entire area was not virtually a "chamber of horrors" is borne out by defendant's conduct during the course of the pipe installation. Although defendant must be charged with knowledge of the dangerous character of the lead-in wire which injured plaintiff, all specific warnings were directed solely to the uncased transformers. Through its representative who was supervising the installation, the defendant repeatedly warned Pittsburgh employees of the danger that lurked in and about the bus bar and corrugated transformers. They were told "[n]ow, you are getting where that is dangerous. You can walk into that and if you do it will bite. In that situation I specifically pointed out the bus bar because they had piled the dirt so high you could walk right into it." But there the verbal warning stopped. There is credible evidence from which a jury could properly find that at no time was there any warning given that inasmuch as the lead-in wire carried as much as 13,000 volts, it was even more dangerous to work in close proximity to this wire. Surely defendant was fully aware that work was progressing in the immediate vicinity of the emergency transformers. Defendant's supervisor, Mr. Shannon, testified, "I had been there within a few minutes before the accident. I had just left when the accident happened." But he gave no warning of the impending danger, at least there is evidence that he did not. Nor are we justified in holding that, apart from any oral warnings, plaintiff's knowledge, as a reasonable man, concerning the dangerous character of electrical equipment generally, would bar him from recovery as a matter of law. That the

dangerous object which caused the havoc to plaintiff was neither open nor obvious is scarcely debatable for as we have seen, the offending device (the lead-in wire), was covered with insulation, and this, together with the fact that all specific warnings were directed to the 440 volt bus bar, could have the conceivable effect of lulling a reasonably prudent person into a sense of safety. But the insulation was not intended nor designed to render the wire harmless if contact therewith was made. In the words of defendant's Mr. Shannon: "It isn't customary to insulate that tension of wire and wasn't put there for insulation purpose. Normally that wire would be bare because for purposes of insulation, **that insulation was absolutely worthless**—might just as well not be there."

We have indulged in an exhaustive review of the facts, and have carefully studied decisions of the Iowa courts bearing upon our factual situation. As previously discussed, the particularly dangerous element of electricity here involved is a circumstance properly to be considered by a jury in determining whether defendant has exercised ordinary care. Here, there was evidence from which a jury could justifiably find that the wire which injured plaintiff constituted a latent danger; that this danger was known to defendant; that plaintiff did not have actual knowledge thereof and in the exercise of ordinary care on his part would not have discovered the same; and that, under the circumstances, the warning given by defendant was inadequate.

Affirmed.

Van Oosterhout, Circuit Judge, dissenting.

I agree with the majority's conclusion that plaintiff was an invitee of the defendant. Plaintiff was an employee of Pittsburgh, an independent contractor, engaged to do the

construction work here involved. It is stipulated that Pittsburgh's status was that of an independent contractor, and that Pittsburgh under its contract "shall furnish all labor and materials, tools, supervision and methods as outlined in the specifications." Defendant had no supervisory power over the plaintiff, but had only the right to see that the end product of Pittsburgh's work conformed to the specifications. It is apparent that plaintiff was not an employee of defendant. Thus, defendant was under no legal obligation to furnish the plaintiff with a safe place to work. No claim is made that the defendant did anything to create an unsafe condition upon its premises during the period the work project was being carried out. The electrical equipment in the enclosed area, with respect to being energized and in all other respects, was the same at the time of the accident as it was when the project was commenced. Under such circumstances, as the majority properly states, defendant's legal obligation towards Pittsburgh and plaintiff, as Pittsburgh's employee, is that announced in the **Gowing** and **Atherton** cases, cited and quoted by the majority. Defendant's duty to plaintiff as an invitee was to warn the plaintiff or his employer of any hidden danger of which the defendant knew or in the exercise of ordinary care should have known, and which was not known, or in the exercise of ordinary care could not have been known, to the contractor or the injured employee.

The plaintiff was injured by a wire leading into a transformer. There is serious doubt whether any hidden danger situation is presented. Plaintiff concedes that the employees at the time the project was commenced discussed among themselves the wisdom of working in the enclosed electrical area. Plaintiff testified that he was "familiar with transformers, generators and electrical equipment to the extent that anyone who comes anywheres near them would be familiar with them," and that "it would be a

safe assumption on the part of anyone entering an enclosed area of this nature, that some of the transformers might be energized." He also admitted that transformers are dangerous, primarily the wiring above the transformer.

The injury-inflicting wire led into what are described in the majority opinion as "emergency transformers." At the time of the accident neither the plaintiff nor his employer knew that the transformers were emergency transformers. Plaintiff so testified. So did Pittsburgh's foreman.

If any hidden danger existed as to which defendant was required to give warning, the defendant fully complied with such duty. The electrical area, in which the transformers were located, was enclosed by a fence upon which signs were erected, reading "DANGER 13,200 VOLTS." Similar signs were posted within the enclosed area, one within a few feet of the immediate scene of the accident. Plaintiff admitted seeing such signs. It is likewise established beyond dispute that defendant's foreman orally advised Pittsburgh's foreman that the electrical equipment in the fenced area was "hot," and that defendant's powerhouse engineer gave a similar warning. Such warning was broad and by its terms applied to all of the electrical equipment in the enclosure, of which the transformer and the lead-in wire were a part.

There is substantial evidence by Pittsburgh's foreman that he conveyed the warning information to its employees. Plaintiff testified in substance that he believed his foreman's statement that he gave such warning, but plaintiff states that he did not hear it given. To the extent that any oral warning was required, defendant met its obligation by warning Pittsburgh's foreman. It was Pittsburgh's duty to protect its workmen.

The majority attaches considerable significance to bus bar warnings. The bus-bars were on other transformers

located at some distance from the scene of the accident. It is true that the defendant's employees did in a few instances give specific warning as to the bus bars at a time when Pittsburgh's employees were working in the immediate vicinity of the bus bars. Plaintiff admits hearing the bus bar warning, but states: "The exact location of that bus bar I don't know. If I saw a bus bar I would recognize it immediately and I would know then where it was; but I never actually saw the bus bar." It is difficult to see how plaintiff could have been misled by the bus bar warnings. The bus bar warnings were not inconsistent with and did not detract from the broad overall warning conveyed by the enclosing fence, the signs, and the oral warnings.

Plaintiff also urges that he was misled by the circumstance that the lead-in wire causing the accident was insulated. The testimony is that the insulation afforded no protection on a wire of this voltage, and there is also testimony that lead-in wires of this type are usually bare. Defendant's warnings were not limited to bare wire, but covered the hazards of all electrical equipment in the fenced area. Plaintiff's own testimony shows that he knows that wires above transformers are particularly dangerous. The record does not fairly warrant any inference that the plaintiff relied in any way upon the fact that the lead-in wire was insulated. It is apparent that plaintiff did not learn until after the accident that the lead-in wire which caused his injury was insulated. One of plaintiff's specifications of negligence is, "In failing to cause the wires to which plaintiff was exposed, if live, to be properly and adequately insulated."

The plaintiff has suffered serious injuries in an unfortunate accident. In my opinion he has wholly failed to establish actionable negligence on the part of the defendant. Under the circumstances of this case, the defendant

can not be charged with any negligence that might have existed on the part of plaintiff's employer. The motion for a directed verdict should have been sustained. I would reverse.

A true copy.

Attest: Robert C. Tucker,
Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT ENTERED APRIL 17, 1959.

United States Court of Appeals for the Eighth Circuit.

No. 15887 - - - - September Term, 1958.

Clinton Foods, Inc., a Delaware Corporation,
Appellant,

vs.

Marvin A. Youngs.

Appeal from the United States District Court for the Southern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

April 17, 1959.

COPY OF COURT OF APPEALS OPINION FILED JULY 15, 1958.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,887.

Clinton Foods, Inc., a Delaware Corporation, Appellant,
vs.
Marvin Youngs, Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[July 15, 1958.]

Wayne G. Cook and Craig Cook (Cook, Blair, Balluff, Wedean and Nagle were with them on the brief) for Appellant.

Isador Katz (Carl H. Lambach, Margaret Stevenson, Lambach, Stevenson and Dircks, and Reidy, Katz, McAndrews, Durkee and Telleen were with him on the brief) for Appellee.

Before Sanborn, Woodrough and Vogel, Circuit Judges.

Vogel, Circuit Judge.

Clinton Foods, Inc., appeals herein from an adverse judgment based upon a jury verdict in a damage action between citizens of different states and involving more than the jurisdictional amount.

The accident resulting in injuries to plaintiff-appellee occurred in the State of Iowa. The law of that state controls.

Appellant owns a large food processing plant at Clinton, Iowa. In 1953 it awarded a contract to Pittsburgh Piping and Equipment Company for the installation of a 20-inch water main on its premises. Appellee, Marvin Youngs, was then an employee of Pittsburgh Piping assigned to the crew designated to execute such project. Appellant's plans required that the new water main be laid through an enclosure containing two banks of electrical transformers and within a few feet of one of those banks. For lack of adequate space, diggings from the ditch were piled by Pittsburgh's employees in and about the enclosure to within a foot from the top of the emergency transformer base. Work on that raised level put appellee and the other crew members within touching distance from the wires leading to and from the closest transformer. The three transformers on the base were approximately four feet in height and were equipped with apparatus to support the attached lead-in and out-put wires. The lead-in wire, from which appellee sustained the injuries here involved, was mounted vertically outside the end of the support apparatus closest to the ditch. This wire carried an electrical pressure of 6,900 to 13,200 volts. With reference to that particular wire, appellant's mechanical engineer Shannon testified:

> "The wire coming down to the rear on Plaintiff's Exhibit 5, is the one—the high tension line. • • • It comes down and is fastened to an insulator. Loops out here and then goes up into the transformer. • • • The wire that comes down out of this insulator was covered with an insulating substance, but it wasn't insulated for that purpose. It happened that it was the right sized wire and they used it. It isn't customary to insulate that tension of wire and wasn't put

there for insulation purpose. Normally that wire would be bare because for purposes of insulation, that insulation was absolutely worthless—might just as well not be there. * * *

We didn't keep the situation in the enclosure in a hazardous condition. We kept this in a very normal condition. We enclose all our tranformer banks. They are not hazardous if you know what you are doing there. We have to work within inches of those hot wires frequently. We weren't asking them to work within feet of it. Normally people who work in there are electricians and not other people: That's why they were cautioned each day to be careful. I knew that these men were not electricians but they were intelligent people. I didn't tell them that there was any switch up there that could open that circuit. I wouldn't have told them that because we didn't want them . . . didn't want that switch open, couldn't be open without creating a hazard."

There were several signs in and on the enclosure displaying the words "Danger 13,200 Volts". One of these signs was mounted on a telephone pole approximately six feet from the spot where appellee was injured. The remaining signs were mounted on the surrounding fence. It is admitted that some of the appellant's employees orally warned the crew, of which appellee was a member, that the enclosure was an electrical danger area. As to the extent and adequacy of such warnings, however, there is dispute. Appellee testified that:

"We had worked intermittently about 5 days in the area. At the time that they first discussed going through that enclosed area with a pipe line, several of the boys and myself discussed whether or not that was a wise idea. Of course we don't design the jobs nor is it our place to say where it goes. Our job is to do it. We discussed that, and the only information or

warning that I ever got was the fact of an exposed bus bar at the far end. That came up at the time when Mr. Owen and Mr. Johnson were laying out elevation lines in the ditch itself, for the excavation of the ditch. That was the incident to which Mr. Morgan testified yesterday. I had never received any warning of any kind to indicate that the wire you are pointing out which runs down a steel flange to what appears to be the rear of transformers that have been identified as emergency transformers, present any unusual hazard. We had not been warned that the wire was the equivalent of a bare wire carrying 13,000 volts. Had it been bare, we wouldn't have gotten within 3 foot of it."

Appellee also testified that:

"• • • transformers ordinarily are dangerous, but it is primarily the wiring above the transformer—high up out of reach—and, as a matter of fact, all of the high voltage wires I have ever seen have been bare wires when they come in a transformer area. From the picture, that wire was covered."

And:

"The warning of a dangerous bus bar was just given generally, that there was an exposed bus bar in the area and that it was, of course, naturally dangerous. The exact location of that bus bar I don't know. If I saw a bus bar I would recognize it immediately and I would know then where it was, but I never actually saw the bus bar.

"I am familiar with transformers, generators and electrical equipment to the extent that anyone who comes anywheres near them would be familiar with them. I am not an electrician. I am aware though, of some of the things that happen in all those places to safeguard that equipment. I testified that trans-

formers are normally dangerous. It would be a safe assumption on the part of anyone entering an enclosed area of this nature, that some of the transformers might be energized. * * *

I didn't know the exact purpose of these transformers. I didn't know whether they were emergency or in full-time operation."

"The voltage was not too high—13,000 volts. I don't consider 13,000 volts excessively high, no. I observed signs to that effect in the area. There were several metal signs saying 'Danger 13,000'—in the general area, the area as a whole. They were placed on the fence or telephone pole."

Other evidence was offered by both sides showing the nature and extent of the various warnings given to the foreman of the crew and crew members generally.

The laying of the 20-inch pipe line in an open ditch within seven or eight feet from the emergency transformer base required appellee and others to work on an artificially raised ground level in closer than usual proximity to the subject transformer base and lead-in wire. Other than the signs, no specific warnings were given by anyone as to the dangerous character of the high tension lead-in wire from which the appellee received his injuries.

The occurrence of appellee's injuries and the events immediately preceding them are related in the testimony of appellee's foreman, Edward Morgan, quoted in part as follows:

"I saw Mr. Youngs immediately before he got hurt. I was standing on one of the dirt piles north of that emergency transformer bank, facing towards the slough.

We were putting this piece of pipe in the ditch, and we had a chain fall on this timber over the center of the ditch. We had a rope snubbed on each end of the

pipe and Sullivan and I was on the one end and we had it snubbed around a telephone pole, and the other boys, two of them were on the other one or one of them was, or one on the chain fall, I don't remember. I know I was on the one line that was around the telephone pole, and we was holding the pipe back snubbing it while it was being dragged in the ditch by the chain fall with the fellow on the chain fall and as the pipe swung in the ditch and settled down I looked up, turned to the pump house and looked up and Bud (appellee) was taking a step or was going off that plank, as I see it, off the plank towards the pump house, and the only thing I think he was going, he was going over to the ladder next to the pump house to go down the ladder to help land the pipe in the ditch. As he stepped in that direction I saw a big flash and a drop of—like a drop in power or short, and that was it. * * * Bud fell back I would say north away from the pump house, and he fell and his shoulders hit across the timber we had across the ditch and his arm fell over the top of the timber and his head, or whichever you want to call it, head or neck, maybe a difference of opinion there, rested up against the angle iron on the corner of that transformer bank. The dark end spot on the angle iron, as it appears on Plaintiff's Exhibit 3, is where his head or neck was resting—that burned spot."

The case was submitted to the jury on instructions to which no exceptions were taken. Clinton's appeal, however, is based upon the question of liability and its contention that there was insufficient evidence under the law of Iowa to take that issue to the jury. See **Coca-Cola Bottling Co. of Black Hills v. Hubbard**, 8 Cir., 1953, 203 F. 2d 859, 861. Appellant's timely motions for directed verdict and for judgment notwithstanding the verdict were denied. It is from these rulings and the judgment

of the trial court based upon the verdict herein that appellant makes its specific claims of error.

The primary question goes to the sufficiency of the evidence. Before appellant can prevail, it must be determined that there was no reasonable basis upon which findings of negligence in appellant and its ultimate liability for appellee's injury could be based. **Egan Chevrolet Co. v. Bruner,** 8 Cir., 1939, 102 F. 2d 373, 377, 122 A. L. R. 987; **Gowing v. Henry Field Co.,** Iowa, 1938, 281 N. W. 281, 283.

We think the applicable Iowa law regarding the duty owed by an owner to an independent contractor or an employee of such contractor is most carefully stated[1] in **Gowing v. Henry Field Co.,** Iowa, 1938, 281 N. W. 281, 284:

> "The only duty owing by the defendant to the plaintiff as an independent contractor was that of exercising reasonable care to promote his safety. Plaintiff was an invitee and it was defendant's duty to warn him of any danger in and about the premises which he knew of or in the exercise of ordinary care ought to have known of and of which plaintiff was

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[1] In its opinion, the Iowa Supreme Court stated:

"That the plaintiff fell and sustained a serious injury is not disputed. The case was submitted to a jury which returned a verdict for the plaintiff in a substantial sum. Counsel for appellee have gone to great pains and expended a great deal of labor and effort to sustain this verdict. In view of these facts, we have given this case our very careful study and consideration well realizing that ordinarily the questions of proximate cause, as well as contributory negligence, are matters for the jury and it is only where the facts are such that all reasonable men must draw the same conclusion from them that these questions become questions of law for the court. In passing on defendant's motion to direct a verdict, the plaintiff is entitled to have the evidence considered in the light most favorable to him. Willers et al. v. Flanley Grain Co., Iowa, 275 N. W. 474. 'Every inference reasonably permissible in support of the issue should be carried to the aid of the evidence.' McWilliams v. Beck, 220 Iowa 906, at page 909, 263 N. W. 781, at page 782. Having in mind these rules, we still find that defendant's motion should have been sustained."

not aware or which in the exercise of ordinary care on his part would not have been discovered. **Steele v. Grahl-Peterson Co.**, 135 Iowa 418, 109 N. W. 882.

Defendant was not responsible to plaintiff as an independent contractor for injuries from defects or dangers which the contractor knew of or ought to have known of, 'but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this, he is liable for resultant injury.' Douglass v. Peck & Lines Co., 89 Conn. 622, 95 A. 22, 25; 44 A. L. R. 894, note; **Arizona Binghampton Copper Co. v. Dickson, Adm'r, etc.**, 22 Ariz. 163, 195 P. 538, 44 A. L. R. 881." (Emphasis supplied.)

In that case the plaintiff, an independent contractor, was injured in attempting to descend from the flat roof of a two-story building by means of a fire escape which he alleged was in a defective condition. A jury returned a verdict for the plaintiff and judgment was entered thereon. The Supreme Court of Iowa reversed, holding that defendant's motion for a directed verdict should have been granted. In so doing, the Iowa court quoted with approval from **Stein v. Battenfield Oil & Grease Co.**, 1931, 327 Mo. 804, 39 S. W. 2d 345, 351, where plaintiff fell into a rapidly moving belt and the court held as follows:

"'The deceased, in going to the respondent's plant as an independent contractor to do work, was an invitee. The respondent would be liable for injury to him occasioned by any unsafe condition of the premises encountered in the work, which was known to it but unknown to him; **but was not liable for injuries resulting from conditions obviously dangerous and known by the deceased to be so.**'" (Emphasis supplied.)

In the very recent case of **Atherton v. Hoenig's Grocery**, Iowa, 1957, 86 N. W. 2d 252, 255, 256, the Iowa Supreme Court restated the law applicable to this case:

> "The possessor of real estate is not an insurer of the safety of those who come upon his premises by invitation, express or implied. Negligence is predicated upon an unperformed duty. The duty owed by the inviter is to those, and to those only, who do not know, or, in the exercise of reasonable care for their own safety, have no reasonable means of knowing, of defects or dangers. He may avoid liability in two ways: by making and keeping his lands safe, or by warning of the dangers. Obviously, actual knowledge of defects and dangers is equivalent to, perhaps better than, a warning. The Virginia Supreme Court has well put the rule in these words: 'The duty to warn, however, exists only with respect to latent dangers, not to those which are or ought to be obvious to the invitee. To sustain a charge of negligence the unsafe condition relied on must be one of which the owner knew or should have known, and the invitee did not know and could not reasonably have discovered.' **Trimyer v. Norfolk Tallow Company**, 192 Va. 776, 66 S. E. 2d 441, 444. * * *' **Zuercher v. Northern Jobbing Company**, 243 Minn. 166, 66 N. W. 2d 892, 897 ('* * * there is no duty to warn a business visitor or an invitee against dangers which are known to the latter or which ought to be known and obvious to any person in the exercise of reasonable care.') * * *."

The duty owed by an owner to an employee of an independent contractor is the same as the duty owed to the contractor. **Steele v. Grahl-Peterson Co.**, Iowa, 1906, 109 N. W. 882, 883. For an additional statement of the Iowa rule regarding the appellant's duty see our opinion in **American Dist. Telegraph Co. v. Kittleson**, 8 Cir., 1950, 179 F. 2d 946, 950.

Under the Iowa law as announced in the **Gowing** and **Atherton** cases, the only duty owed by Clinton Foods as owner to Youngs as an employee of Pittsburgh, the independent contractor, was that of giving him warning of any danger in and about the premises of which it was aware or which, in the exercise of ordinary care, it should have become aware and of which Youngs was not aware and which, in the exercise of ordinary care, he would not have discovered. This case, then, resolves itself into a question of whether or not the danger was a latent or hidden one unknown to the appellee. We think clearly it was not.

In the first place, the area containing the transformers was enclosed by wire fence and walls, obviously to keep persons from coming in contact with the transformers and other dangerous electrical equipment therein. Several metal warning signs were placed on the fence and on a telephone pole within the enclosure, carrying the legend "Danger 13,200 Volts". Any person of normal intelligence would be immediately aware of the danger, that is, that the enclosed area was "hot". Appellee himself admits talking to co-employees about the advisability of trying to lay a water main through this area, thus indicating an awareness of the danger. The work proceeded, nevertheless. Appellee worked there in the area about five days. He knew that "transformers ordinarily are dangerous". He was "familiar with transformers, generators and electrical equipment to the extent that anyone who comes anywheres near them would be familiar with them". He testified that, "it would be a safe assumption on the part of anyone entering an enclosed area of this nature, that some of the transformers might be energized". He did not "consider 13,000 volts excessively high". He observed the "metal signs saying 'Danger 13,000'—in the general area, the area as a whole". We do not think reasonable minds could come to any conclusion other than

that the danger here was open and obvious and that the appellee was aware thereof.

Appellee argues that the particular lead-in wire to the transformers and with which he came in contact carried insulation and ordinarily lead-in wires carrying voltage this high were bare, as insulation on such was ineffective. The subject wire obviously was connected to the transformer and near it, within a distance of a few feet, was a metal sign carrying the warning, "Danger 13,200 Volts". The likelihood of danger in such a wire, leading into the transformers and having a warning sign near it and being confined within a protective enclosure carrying additional warning signs, should be obvious under the most exacting requirements. Reasonable minds could not say that this was a latent or hidden danger of which specific warning should have been given to appellee. There was no duty on the part of appellant to precede the workmen and point out the different voltages of the different wires within the hot or danger area. Applying the Iowa rule as set forth, supra, the appellant violated no legal duty that it owed to the appellee. The warnings given were adequate and in addition, the danger was obvious. A contrary holding would make the appellant an insurer, which it was not.

We have examined all of the cases which the appellee claims support his right of recovery. None of them changes the rule as stated in **Gowing v. Henry Field Co.** and **Atherton v. Hoenig's Grocery**, supra.

Reversed.

Woodrough, Circuit Judge, dissenting.

I am in complete disagreement with the declarations of the majority opinion on which it rests decision that the danger to which plaintiff was subjected, from which, he

suffered injuries, was "open" and "obvious" and that "plaintiff was aware thereof".

(1) I think it was neither "open" nor "obvious". It consisted of some 13,000 volts of electricity that ought to have been conducted in a bare wire or bus bar. When so conducted into transformers the danger of it is laid "open" and "obvious" to men of plaintiff's experience who have to work around them (if it is placed where they see it). Instead of being so conducted the wire that carried the current that injured plaintiff was covered up with insulating material that would not insulate it, but did hide the function it was performing and its deadly danger. The proof was that the way the seemingly safe insulated wire came to be conducting the high voltage was, "because it happened to be the right size and they used it." . . . "Normally that wire would be bare."

(2) I think plaintiff was not aware of the danger to which he was subjected by which he was hurt. The signs posted about the enclosed area where he was working as an invitee of defendant did not mean to plaintiff "that the [whole] enclosed area was hot". Having worked around transformers before, he knew better than that, and if a warning was given to him that "the enclosure was an electrical danger area", such a warning could have done him no good. His quoted and unquoted testimony reflects that being a pipe fitter and not an electrician he fully shared the ordinary fears of the ignorant about undefined dangers that maybe lurk in transformers and in areas containing transformers.

But there is no reason to connect such vagaries of imagination with this case. Plaintiff was not hurt by any mysterious or ghostly danger of the transformers or of the area where they were. Men work around transformers, as did plaintiff, thousands of them daily and perhaps one occasionally gets hurt through such a danger. But

plaintiff was injured by electric shock transmitted to him from the specific covered up wire above described. A defined concealed danger that defendant was fully aware of. The question in the case is whether plaintiff had knowledge of that specific danger that injured him, that I have called "latent" and "not open"? If was proved that the casings of the transformers herein were not hot. They were effectively insulated. Plaintiff said that all the high voltage wires to or from transformers he had ever seen were bare wires [or bus bars] when they come in a transformer area. The proof is that in practice they are bare. "Bare wires are normal." He testified without contradiction that he was never warned that the wire from which he received the shock presented any unusual hazard and that he had not been warned that it was the equivalent of a bare wire carrying 13,000 volts. He added to that what he intended to be and should be taken to be his positive and unequivocal denial of such knowledge on his part. "Had it been bare we wouldn't have gotten within three feet of it." I find no ground to justify a conclusion that his denial of knowledge was false and certainly none that it was so palpably false that the jury had no right to believe it. I dissent.

A true copy.

Attest: Robert C. Tucker,
Clerk, U. S. Court of Appeals, Eighth Circuit.

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,887.
Civil Action.

CLINTON FOODS, INC., a Delaware Corporation,
Appellant,

vs.

MARVIN YOUNGS,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

The Plaintiff-Appellee, Marvin A. Youngs, brought suit against the Defendant-Appellant, Clinton Foods, Inc., to recover damages for injuries suffered by coming in contact with a high tension wire while working on defendant's property at Clinton, Iowa.

The complaint alleged that Clinton Foods, Inc., had contracted with plaintiff's employer, Pittsburgh Piping & Equipment Company, to install a turbine on its property and the piping necessary to effectively operate the tur-

bine and had retained supervisory control of the execution of the project and full control of the surrounding premises adjacent to and remote from the site of the performance of the work. The complaint further alleged that the defendant was negligent in one or more of the following respects:

1. In preparing and causing, incident to the execution of the general project, the laying of a watermain in and through the enclosure of a bank of transformers carrying high voltage electricity without providing the adequate safeguards to prevent plaintiff from coming in contact with the wire leading to said transformers.

2. In causing said work to be executed in such close proximity to said transformers without causing the current in the wire leading to said transformers to be shut off during the performance of said work.

3. In failing to warn plaintiff of the fact that said lead-in-wire was live.

4. In failing to cause the wires to which plaintiff was exposed, if live, to be properly and adequately insulated.

5. In preparing plans for and causing the execution of a project under conditions of obvious hazard, subjecting this plaintiff to a continuously imminent danger of electrocution without providing adequate safeguards.

and that plaintiff was free of contributory negligence and the negligence of defendant was the sole proximate cause of his injuries and ensuing damage.

So far as material to this appeal, the defenses raised in the answer filed by Clinton Foods, Inc., consisted of an allegation that the work was being performed under the supervision and control of Pittsburgh Piping & Equipment

Company, a general denial of the allegations of negligence, an allegation that plaintiff was guilty of contributory negligence in the premises, and an allegation that plaintiff assumed the risk in the premises.

In the interest of convenience, the Appellant, Clinton Foods, Inc., will sometimes be referred to as the defendant and sometimes as Clinton; the Appellee, Mr. Youngs, will customarily be referred to as plaintiff; and plaintiff's employer, Pittsburgh Piping & Equipment Company, will be referred to as Pittsburgh.

During the trial of the case, it was stipulated that, as to the defendant, plaintiff's employer, Pittsburgh, occupied the status of an independent contractor (Record, p. 33), and that Pittsburgh would provide all labor, materials, tools, supervision and methods as outlined in the specifications as well as all equipment and transportation necessary for proper execution of the work (Record, pp. 33 and 34).

The evidence was devoted primarily to the question of whether the plaintiff was warned of the danger involved in working in the area and whether he was aware of the danger from any other source.

There was disagreement as to the legal duty of the defendant, plaintiff contending that it was defendant's duty to provide a safe place to work and to avoid any condition which might imperil his safety, and predicating his case primarily upon the failure of the defendant to turn off the electricity in the area while the work was going on. Defendant contended that its duty was to warn plaintiff, and that it was not obliged to furnish a safe place to work or to turn off the electricity. It is also contended that the proximate cause of the accident was Pittsburgh's negligence in carrying on its work in proximity to an area of known danger, without requesting a temporary shut down in power, and in refusing defendant's offer of barricades or rubber blankets to protect its employees. The court ap-

parently adopted the theory of the plaintiff and instructed the jury in accordance therewith. The jury returned a verdict in favor of the plaintiff in the amount of $80,000.00.

Installation of the turbine required that a 20-inch cast iron pipeline be laid underground to run to the turbine. The plans which were procured by the defendant called for running the pipeline through an enclosed area which contained defendant's power plant, including two sets of transformers. One bank of transformers was the usual power source and the other bank was the emergency or stand-by power source.

A ditch was dug through the enclosed transformer area. It had been excavated by a crew of laborers employed by Pittsburgh (Record, p. 19). The ditch passed by the bank of emergency transformers at one point and the center of the ditch was 7 feet 3 inches from the concrete base supporting the transformers. According to Edward G. Morgan, foreman of the crew of pipefitters employed by Pittsburgh, the ditch was about 36 inches wide (Record, p. 19). Another employee, Norman T. Owen, testified that it was "approximately between 4 and 5 feet in width". (Record, p. 23). The concrete base upon which the transformers sat was approximately three feet above the ground level (Record, p. 7). Dirt which had been excavated from the ditch was thrown up alongside this concrete base. According to Cecil W. Shannon, defendant's mechanical engineer, the dirt was piled up to the top of the base (Record, p. 14), while the foreman, Mr. Morgan, testified that it had been piled up to within 14 inches of the top of the base (Record, p. 16). The transformer which was nearest to the ditch had a lead-in wire which was about a foot further from the edge of the ditch than was the edge of the concrete base (Record, pp. 13 and 14). The record is silent as to its height above ground level but it may be observed in Plaintiff's Exhibit 3 (Record, p. 67). It was this wire which plaintiff contacted and which caused the injuries.

During the course of plaintiff's work on the job, the emergency transformers were constantly energized (Record, p. 9). It was the custom of the defendant to keep them in service at all times except when work had to be done on them (Record, p. 14) because its operations were such that, for the safety of its own employees, their being in position to cut in automatically, upon a failure of the regular facilities, was imperative.

Plaintiff was a member of a crew of pipefitters numbering five men, including the foreman. At the time of the injury to plaintiff, this crew was engaged in swinging a length of pipe into the ditch at a point opposite the emergency transformers, and a chain-fall was being utilized in this work (Record, p. 16). The chain-fall had been connected around a plank which crossed the ditch, with one end resting upon a pile of dirt and the other end resting upon the concrete base (Record, p. 16). Plaintiff had been standing on the plank and apparently, immediately before the accident, had started to leave the plank to go to the ladder next to the pump house and descend to the ditch (Record, p. 17). As he did so, he contacted the lead-in wire with his hand (Record, p. 18), and he fell with his head or neck resting against the angle iron on the corner of the transformer bank (Record, p. 17).

The evidence disclosed the existence of several warning signs in the area which indicated danger and a voltage of 13,200 volts. There was considerable evidence of oral warnings issued to the foreman and the members of the crew which will be dealt with more fully and more explicitly in the argument.

Plaintiff had been at work, as an employee of Pittsburgh, for about five or six weeks on defendant's property (Record, p. 27) and had spent a total of about five days, not consecutively, in the ditch area and two or three days in the ditch (Record, p. 28).

Defendant moved for a directed verdict at the close of plaintiff's evidence (Record, pp. 34 and 35) and renewed its Motion for Directed Verdict at the close of all of the evidence (Record, pp. 39 and 40). After the return of the verdict and the judgment entered thereon, defendant filed a Motion for Judgment Notwithstanding the Verdict (Record, pp. 52 and 54). Defendant's Motion for Directed Verdict urged at the close of plaintiff's evidence was denied (Record, p. 35), defendant's Motion for Directed Verdict at the close of all the evidence was denied (Record, p. 41) and its Motion for Judgment Notwithstanding the Verdict was denied and overruled (Record, pp. 55 and 56). From the judgment entered, the defendant appeals on the basis of these rulings.

The defendant does not attack the size of the verdict rendered nor does it rely upon error other than error in overruling the three motions hereinbefore referred to. The appeal is based purely upon the question of liability and defendant contends that there was insufficient evidence to take the case to the jury.

FOREWORD.

In connection with the trial below, and particularly during proceedings on the Motion for Judgment Notwithstanding the Verdict, it became apparent to us that counsel for the plaintiff were laboring under what we believe to be a misapprehension as to the applicability of certain Iowa cases, based on an Iowa statute raising an inference or presumption of negligence on the part of those maintaining lines for the transmission of electricity, and that they succeeded in persuading the trial court to adopt their theory of the case. One of the plaintiff's positions was that, because electrical transmission facilities owned by the defendant were involved, the defendant owed a duty to make the premises safe for the employees of an inde-

pendent contractor notwithstanding the fact that the latter was solely responsible for the method, progress and details of the work, and even though the hazards involved were fully known.

Plaintiff's conception of reasonable care in a case involving electricity differed greatly from defendant's view. In support of his theory, plaintiff quoted at length from a large number of cases involving electricity in one way or another.

Defendant feels that it can and, in connection with its Motion for Judgment Notwithstanding the Verdict did, distinguish these cases from the one here involved. Either they related to public utilities, were decided under the laws of states having an entirely different concept, or the quotations were out of context. The result was, in essence, two utterly conflicting, affirmative theories. This necessitated an extensive review and discussion of each of the cases cited, which covered forty-four typewritten pages and a review of the legislative history of the statute, requiring eleven pages.

Defendant cannot anticipate whether plaintiff's theory will be presented in the same way, nor can it anticipate what cases, or how many, plaintiff will rely on in his brief, so this brief will be confined to an attempt to set out and develop defendant's contentions as to the Iowa law and its application to this matter.

We have made this explanation because we fear that we will be unable to adequately reply to plaintiff's brief in the fifteen pages allotted us by Rule 11 of the Rules of this Court, and we wish to call attention to the fact that we may find it necessary to apply for permission to file a somewhat longer reply brief than the Rule contemplates.

POINTS TO BE ARGUED AND AUTHORITIES.

I.

The duty of the defendant to use due care for the safety of plaintiff requires only that it do nothing to render its premises unsafe and that it warn plaintiff of any dangers known to it but unknown to him.

Gowing v. Henry Field Co., 225 Iowa 729, 281 N. W. 281;

American District Telegraph Co. v. Kittelson, 179 Fed. (2d) 946 (8 Cir., Iowa);

Deaton v. Board of Trustees of Elon College, 226 N. C. 433, 38 S. E. 2d 561;

44 A. L. R. 982 (Annot.).

II.

The defendant was not guilty of any act of negligence in that

(1) Plaintiff was or should have been aware of the dangerous condition whereby he was injured,

(2) Defendant warned plaintiff personally of the danger,

(3) Defendant warned plaintiff's employer of the danger.

Myers v. Gulf Public Service Corp., 15 La. App. 489, 132 So. 416;

Willis v. Snyder, 190 Iowa 248, 180 N. W. 290;

Engle v. Reider, 366 Pa. 411, 77 A. 2d 621;

American District Telegraph Co. v. Kittelson, 179 Fed. 2d 946 (8 Cir., Iowa).

III.

The negligence of plaintiff's employer, Pittsburgh Piping & Equipment Company, was the sole proximate cause of the accident and the injuries to plaintiff, and defendant cannot be held accountable.

Reilly v. Chicago, N. W. Ry. Co., 122 Iowa 525, 98 N. W. 464.

IV.

Plaintiff cannot recover because he assumed the risk inherent in performing work in a dangerous area.

Gowing v. Henry Field Co., 225 Iowa 729, 281 N. W. 281.

ARGUMENT.

I.

The Duty of the Defendant to Use Due Care for the Safety of Plaintiff Requires Only That It Do Nothing to Render Its Premises Unsafe and That It Warn Plaintiff of Any Dangers Known to It, But Unknown to Him.

The plaintiff undertook his duties on property owned by the defendant, Clinton Foods, Inc., as an employee of Pittsburgh, an independent contractor (Record, p. 33), which exercised full supervision over him (Record, pp. 33 and 34). The defendant did not employ him nor did it exercise any control over his work. Therefore, under the relationship, no duty was imposed upon the defendant to furnish a safe place to work in the sense that a master has the duty to do so.

It was, however, incumbent upon defendant to do nothing which would **create** an unsafe condition during the time that plaintiff was working on its property.

It is undisputed that at no time, during the period while plaintiff was at work on defendant's property, was the power in the transformer area turned off. It was the custom to have the emergency transformers activated at all times except when work had to be done on them (Record, p. 14). At the time in question the plant was running seven days a week. However, even at times when the plant was shut down over the week-end, the transformers were connected in (Record, p. 13).

Therefore, defendant did nothing to turn a "safe" work area into an unsafe one. The danger in the area was ever present and was not created during the progress of the work.

This being the case, the negligence, if any, of defendant must have been negligence of omission—the failure to discharge a duty imposed upon it by the law of Iowa. The sole affirmative duty of the defendant, under the relationship which existed, was to warn the plaintiff of latent dangers of which it was aware.

The Iowa Rule is stated in **Gowing v. Henry Field Co.**, 225 Iowa 729, 281 N. W. 281.

In that case plaintiff was a plumber and was engaged as an independent contractor to install a steam pipe in the gutters of one of the defendant's buildings. In the course of the installation he had attempted to descend a fire escape while carrying two pipe wrenches and a piece of pipe, and while doing so had fallen to the ground and been severely injured. Plaintiff and three others had previously used this fire escape in carrying a long piece of pipe to the ground and **had done so at the suggestion of one Snodgrass, an employee of defendant,** who had been instructed to apprise plaintiff of where the pipe should be placed and, together with two other employees of defendant, to help in the installation.

Plaintiff's action was based upon negligence of the defendant in offering an infirm fire escape for plaintiff's use and in failing to warn him of the danger when it knew or should have known of it.

Defendant averred that plaintiff was an independent contractor and its duty did not extend to furnishing him a safe place to work; that plaintiff had failed to exercise reasonable care; that the defect, if any, was readily apparent and, therefore, plaintiff assumed the risk incident to using the fire escape, and that, if the defect were not readily apparent, it was equally unknown to defendant.

The Supreme Court of Iowa, in discussing the obligations inherent under the relationship established, said:

"The only duty owing by the defendant to the plaintiff as an independent contractor was that of exercising reasonable care to promote his safety. Plaintiff was an invitee and it was defendant's duty to warn him of any danger in and about the premises which he knew of or in the exercise of ordinary care ought to have known of and of which plaintiff was not aware or which in the exercise of ordinary care on his part would not have been discovered. Steel v. Grahl-Peterson Co., 135 Iowa 418, 109 N. W. 882.

"Defendant was not responsible to plaintiff as an independent contractor for injuries from defects or dangers which the contractor knew or ought to have known of, 'but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this, he is liable for resultant injury.' Douglass v. Peck & Lines Co., 89 Conn. 622, 95 A. 22; 44 A. L. R. 894, note: Arizona Binghampton Copper Co. v. Dickson, Adm'r, etc., 22 Ariz. 163, 195 P. 538; 44 A. L. R. 881."

In discussing the rule that no warning is necessary to one who is aware of the danger involved, the Court quoted with approval from **Stein v. Battenfield Oil & Grease Co.**, 327 Mo. 804, 39 S. W. 2d 345, as follows:

"The deceased, in going to the respondent's plant as an independent contractor to do work, was an invitee. The respondent would be liable for injury to him occasioned by any unsafe condition of the premises encountered in the work, which was known to it but unknown to him; but was not liable for injuries resulting from conditions obviously dangerous and known by the deceased to be so. As to these, he was guilty of contributory negligence, or, more accurately, assumed the risk. He knew the belt was unguarded,

he knew the motor was running 'at great speed and with terrific force,' as the petition says and yet he took a posit on 3 feet above the floor with one foot upon the rounded flange of the motor and the other on a cross-piece against the wall about 3 feet away, with his legs astride the rapidly moving belt and his body twisted, while he worked. He was not a servant ordered by the respondent to go where he did; he was an expert following his own advices. He knew the conditions he would have to cope with. Under the authorities the respondent cannot be charged with liability for the unfortunate result.' Main v. Lehman, 294 Mo. 579, 242 S. W. 91; Vogt v. Wurmb, 318 Mo. 471, 300 S. W. 278; Goetz v. Hydfaulic Press Brick Co., 320 Mo. 586, 9 S. W. 2d 607; 60 A. L. R. 1064; Cash v. Sonken-Calamba Co., 322 Mo. 349, 17 S. W. 2d 927."

The status existing between plaintiff and defendant is similar to that described in this quotation. Defendant had no power to order, nor did it order, plaintiff to go where he did. Defendant had no control over the manner in which Pittsburgh performed the contract, merely the right to pass upon the result. While plaintiff was a servant, he was not the servant of the defendant, but of Pittsburgh, which had contracted to do a job which, of necessity, would bring its workers in proximity to the transformers. Defendant had no control over the manner in which Pittsburgh performed the contract, but merely the right to pass upon the result. Under such circumstances, the obligation to furnish a safe place to work was not imposed upon Clinton Foods.

By the nature of the relationship, the defendant's **sole** duty was to warn its invitees, **if necessary.** Defendant's obligation was not such as it would owe to one of its own employees, and it was not bound to furnish a safe place to work. If it were otherwise, no one could safely contract

to have work done in a place known to be dangerous, even if the purpose of the work was to correct that very condition.

In **American District Telegraph Co. v. Kettelson**, 179 F. 2d 946, this court cited **Gowing v. Henry Field Co.**, supra, as establishing the Iowa law as to the duty owed an independent contractor and quoted the first paragraph of the quotation hereinbefore set out: It did so in approving an instruction which read in part:

> "You are instructed that if you find that the condition of the skylight in question did present a hidden defect, danger, or pitfall to persons using the roof, and Armour & Company knew or in the exercise of reasonable care should have known of such condition and should have reasonably expected that the defendant's employees would use said roof in the performance of their duties then the failure to warn the defendant or its employees of such hidden defect, danger or pitfall constituted negligence. . . ."

The Supreme Court of Iowa has never been called upon to apply the doctrine announced in **Gowing v. Henry Field Co.** to a case involving the ownership and maintenance of electric equipment by one who is not primarily engaged in the business of producing and dispensing electricity as a public utility. However, the case was cited with approval by the Supreme Court of North Carolina in a case which was quite similar in many of its facts to the one at bar.

In **Deaton v. Board of Trustees of Elon College**, 226 N. C. 433, 38 S. E. 2d 561, the defendant was the owner of a local electric light system. A portion of it had fallen into a dangerous and defective condition and plaintiff's decedent, together with two others, was engaged to make the necessary repairs. This necessitated replacing six old poles with new poles and transferring five wires from the old poles to the new.

Three of the wires were high-tension, carrying 2300 volts and two carried 110 volts each. The deceased and his associates knew that three of the wires were high tension and two were light circuit wires, but did not know which were high tension and which were low voltage. Defendant failed to advise or warn them in this respect.

The contractors decided to set the six new poles before starting to transfer the wires. However, it became necessary to detach the wires hung on the fourth and fifth poles in order to set the fifth new pole properly. One of the men untied and dropped the wire on the fifth pole and the deceased caught hold of it to pull it out of the way. He received a severe electric shock from which he died.

Decedent's administratrix brought suit against the Board of Trustees. At the conclusion of all of the evidence the defendant moved to dismiss as in the case of non-suit. The motion was allowed and judgment and non-suit was entered and appealed from.

The Court did not specifically decide whether, in view of decedent's personal knowledge, there was negligence in failure to warn him. It affirmed the lower court's ruling on the motion because the decedent's failure to exercise ordinary care for his own safety was such as to induce the conclusion that his own lack of due care proximately caused or contributed to his injury and death.

However, in discussing the duty owed by the defendant, the court spoke as follows:

> "Many of the authorities cited both by plaintiff and defendant involve the master-servant relationship which imposes upon the master duties in excess of those which an owner-contractee owes to an independent contractor. So then, while helpful, they are not directly in point.
>
> "Ordinarily an employer of an independent contractor may not be held liable for injuries which have

been sustained in the performance of the contract by the contractor himself. 35 Am. Jur. 588; Arizona Binghampton Copper Co. v. Dickson, 22 Ariz. 163, 195 P. 538, 44 A. L. R. 881; Roddy v. Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 2d 1112, 72 L. R. A. 746, 24 Am. St. Rep. 333; Annotation, 44 A. L. R. 891.

"Since independent contractors are not servants of the contractee a contractee, in the absence of some special circumstance or circumstances imposing liability, is not liable as master for injuries sustained by an independent contractor, the contractee's liability, if any, being the same as that imposed on him with respect to third persons generally. 39 C. J. 1349, Sec. 1567.

"Although there are decisions contra, it is generally held that one who is having work done on his premises by an independent contractor is under the obligation to exercise ordinary care to furnish reasonable protection against the consequences of hidden dangers known, or which ought to be known, to the proprietor and not to the contractor or his servants.

"The rule applies only to latent dangers which the contractor or his servants could not reasonably have discovered and of which the owner knew or should have known. 39 C. J. 1348, Section 1566; 2 Shearman & Redfield, Negligence 689 (Rev. Ed.); 3 Cooley, Torts, 4th Ed. 426.

"The owner is not responsible to an independent contractor for injuries from defect or dangers of which the contractor knew or should have known, 'but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and he does not do this, he is liable for resultant injury.' Douglass v. Peck & L. Co., 89 Conn. 662, 95 A. 22, 25; Arizona Binghampton Copper Co. v. Dickson, supra; Gowing v. Henry Field Co., 225 Iowa 729, 281 N. W. 281; Annotation, 44 A. L. R. 894; Steele

v. Grahl-Peterson Co., 135 Iowa 418, 109 N. W. 882. See also State Highway & Public Works Comm. v. Diamond Steamship Transportation Corp., N. C., 38 S. E. 2d 214.

"'It has been repeatedly held that where one knowingly places himself in a place of danger which he might easily have avoided he assumes all the risks incident thereto.' Dreier v. McDermott, 157 Iowa 726, 141 N. W. 315, 319, 50 L. R. A. N. S., 566; Gowing v. Henry Field Co., supra. And the owner-contractee is not liable for injuries resulting from conditions obviously dangerous and known by the contractor to be so. Highway Comm. v. Transportation Corp., supra; Gowing v. Henry Field Co., supra."

A discussion of the liability of a contractee with respect to injuries resulting from the dangerous condition of his premises appears at 44 A. L. R. 982. It found the doctrine, as announced by numerous decisions, to be:

"Where the premises on which the stipulated work is executed remain under the control of the principal employer while the contract in is the course of performance, a servant of the contractor is in the position of an invitee, and as such entitled to recover for any injury which he may sustain by reason of the abnormally dangerous condition of the premises or plan thereon, if the evidence shows that the principal employer was, **and the servant was not, chargeable with knowledge, actual or constructive,** of the existence of that condition." (Emphasis supplied.)

It is clear that if the plaintiff was aware, or should have been aware, of the peril existing in the transformer area, no affirmative duty was ever imposed upon the defendant. If such was not the case, then an affirmative duty was imposed, but it was limited to warning the plaintiff of the hazard.

II.

The Defendant Was Not Guilty of Any Act of Negligence in That (1) Plaintiff Was or Should Have Been Aware of the Dangerous Condition Whereby He Was Injured, (2) Defendant Warned Plaintiff Personally of the Danger, (3) Defendant Warned Plaintiff's Employer of the Danger.

Under the law as stated in Point I, plaintiff cannot recover if he was aware of the danger. If he, through his own experience and perception, should have been aware of the peril, there was no duty to warn him of it.

The evidence discloses that Mr. Youngs' experience was such as to make him aware of the danger which existed in the area in which he was working at the time of his injury.

He had been a pipe fitter for about seventeen years, part of the time as maintenance man in various factories and part of the time on construction work (Record, p. 27). He had, in prior employment, worked around electric power plants and had been a foreman for Midwest Pipe & Supply Company which had engaged in a $4,000,000 expansion program at the Riverside Power Plant owned by Iowa-Illinois Gas & Electric Company (Record, p. 31). While not an electrician, he testified that he had the familiarity with transformers, generators and electrical equipment that normally arises from working around them and that he knew that transformers are normally dangerous (Record, p. 31). He further testified that prior to the time the crew went into the enclosed area to lay the pipe through it, he and other crew members had discussed the advisability of doing so (Record, p. 29).

He and the other crew members had worked in the enclosed transformer area for a total of about five days prior to the date of the accident (Record, p. 28). He testified

that it would be a safe assumption on the part of anyone entering an area of this nature, that some of the transformers might be energized, and that he knew that the first bank of transformers which the crew had run pipe past was energized (Record, p. 31). He testified that he did not assume that emergency transformers would be energized. However, he stated that he did not know whether the transformers in question were emergency or full time (Record, p. 31), although he stated that the crew had general information, from an unknown source, that the transformer on which the plank was laid was emergency (Record, p. 32).

He observed several metal signs in the general area saying "Danger, 13,000" (Record, p. 32). He first testified that he did not consider 13,000 volts excessively high but later stated that in his opinion that it is impossible or nearly impossible, to insulate high voltage lines, such as 13,200 volts (Record, p. 32).

In the light of plaintiff's experience, the danger, which might have been "latent" to one wholly devoid of knowledge of the characteristics of electricity, was "patent" to him. He recognized the transformers as such and was fully aware of their dangerous propensities. His attitude in assuming that emergency transformers are not energized is in direct contrast to that of the foreman, Mr. Morgan, who thought the whole area was energized "because usually where you find a transformer bank, there is juice there some place unless somebody tells you different" (Record, p. 20).

It is submitted that his testimony as to having observed the signs is significant. Whether the existence of the signs indicates inherent knowledge on his part, or that the company did warn him by posting them, the fact remains that he could not have been unaware of the existence of danger in the area and, in view of his admitted knowledge

of the danger of transformers and things electrical, defendant contends that, as a matter of law, he was aware of the danger. That being the case, it never became incumbent upon the defendant to warn him of the danger.

Nevertheless, the record discloses that he was warned.

Mr. Shannon, the defendant's mechanical engineer, testified that he had warned the men repeatedly (Record, p. 10). He stated that, in a voice loud enough for the workmen to hear, he said in substance "Watch out for those transformers. They are hot, and they will bite" (Record, p. 11).

Plaintiff's foreman, Mr. Morgan, testified that he had been warned that "It was all hot" (Record, p. 18), and that Shorty Stapleton, defendant's electrical engineer, was the person who had given him the warning (Record, p. 20). He further testified that he relayed, to the members of the crew, Mr. Stapleton's warning that the area was hot, and that he believed they all understood the fact (Record, p. 21). He believed that he had warned Mr. Youngs along with the rest of the crew (Record, p. 21) and testified that "Mr. Youngs was in the group when I related the warning that everything in this area was hot and I think that he understood" (Record, p. 22).

Norman Owen, a member of the crew, testified, "I definitely recall Mr. Morgan saying to be careful" (Record, p. 27).

Another crew member, Robert L. Sullivan, testified that instructions were received from either Mr. Morgan or Mr. Owen that the whole place was hot and that he thought the crew was present (Record, p. 35). He recalled testifying upon a prior examination that those present at the time of the warning were "the fellows that was working with me", and that "Johnson and Owen and Bud and Morgan" were working with him. He identified "Bud"

to whom he had referred, in his prior testimony as Mr. Youngs (Record, p. 36).

Roy J. Stapleton, defendant's electrical foreman, testified that he knew Mr. Young by sight and that prior to the accident, he talked to four of the crew, including Mr. Youngs, about conditions in the transformer area (Record, p. 39). He testified that he had issued the warning to all four but that Mr. Morgan and Mr. Youngs were those closest to him and he felt that he was talking primarily to them (Record, p. 39), and that one of the Pittsburgh crew members acknowledged understanding of the warning (Record, p. 39).

Mr. Youngs testified that he had been warned of an exposed bus bar (Record, p. 29), but denied having been warned that all of the equipment was hot (Record, p. 31). He did not disbelieve Mr. Morgan's testimony that he relayed the warning to the members of the crew but doubted that Morgan knew who was present when he issued the warning. He denied ever having had any conversation with any of Clinton's personnel about any hazards and stated that he had seen Mr. Shannon only twice in five weeks on the job, and then in areas other than the transformer area (Record, p. 30).

Despite plaintiff's denial that he ever received any warning, defendant insists that he did, personally, receive a warning as a matter of law. He received a warning entirely sufficient in the light of his experience. Having admittedly been told of the "hot" bus bar, knowing as he did the dangerous characteristics of transformers, and having observed the signs, he "knew or should have known" of the danger and is precluded from recovery under the doctrine of **Gowing v. Henry Field Co.**

The Court of Appeals of Louisiana, Second Circuit, supported this view in **Myers v. Gulf Public Service Corp.**, 15 La. App. 489, 132 So. 416.

In that case the facts, as alleged by plaintiff, were as follows:

Upon the invitation of the defendant, the senior class of a high school of which decedent was a member, visited the ice plant of defendant for the purpose of studying the processes used in the manufacture of artificial ice. The children were led and directed across and over a large tank or collection of small tanks filled with water, out of which blocks of ice were manufactured. Overhead were wires which conveyed electricity to a device which was used to lift blocks out of the tank and convey them to other parts of the plant. In walking along the top of the water tanks which were wet and slippery, the decedent fell and, in trying to save himself from falling, reached up and caught the light copper wire and was electrocuted.

The plaintiff alleged that the decedent was not guilty of contributory negligence, that his death was due to the gross carelessness and negligence of the defendant and that the proximate cause of the death was the failure of the defendant, its agents or employees to warn the decedent of the danger from the exposed or live wire. It was also alleged that the current should have been turned off while the children were in the room, particularly in view of the fact that the plant was not in operation during the visit of the children. Judgment in favor of the plaintiff was appealed from.

The case is distinguishable from the one at bar in that the court held that the members of the class were bare licensees because they were there for their own benefit and not in any way for the benefit of the defendant. However, although the court cited authority for the proposition that, as bare licensees, the students were not even entitled to warning, it decided the case on the question of whether they were warned.

The court said:

"* * * This live wire was not hidden. It was overhead six feet and three inches above the level of the floor. It was in plain view of everyone and out of ordinary reach. The decedent was a young man practically grown. He was possessed of at least ordinary intelligence. He knew, or should have known, that this ice plant was operated by electricity. This was a matter of common knowledge. As a 'bare licensee' he was required under the law to take these premises as he found them. * * * He should have observed this wire without having it called especially to his attention and having observed it, he should have instantly known the danger of touching it. He evidently knew its danger without being warned. It is more likely that he touched the wire and grasped it involuntarily as one of the girl students testified she started to do, and was prevented by one of her classmates. It would appear, therefore, that the defendant's employee did not lead decedent upon a hidden peril."

The court found that six witnesses for the defense testified that warning had been given the class as well as three of the nine witnesses for the plaintiff. As to this the court said:

"* * * Whether these warnings reached absolutely every student, and particularly the decedent, we are unable to determine. But it is most likely that several did not hear it, as at least six witnesses testified they did not. But it is certain that every student could have received these warnings if they had been attending to the leadership of the employee. It must be taken into consideration that these were high school seniors. They were supposed to possess a high degree of intelligence and everyone of them should have

known better than to grasp any kind of wire in this building. Furthermore, it must be remembered that these students came to this ice factory under the care and direction of the teacher of the class, and the defendant's employee had a right to suppose that they would remain under his guidance and direction during the entire visit.

"We therefore conclude that the employee of the defendant did not knowingly lead the decedent upon a hidden peril and that he did not wilfully cause him harm. It appears further that the employee discharged his full duty to this class in issuing the warnings which he undoubtedly did. The failure of the decedent either to heed these warnings if heard, or, if not, to hear them or any of them, is not to be charged to the defendant. It was a deplorable tragedy, but because it was does not cast blame upon the defendant."

Defendant contends that the testimony given by Mr. Youngs indicates a level of general intelligence at least as high as that attributable to a high school senior, and that his knowledge of things electrical derived from previous experience, is far beyond that of an ordinary high school senior or an average, well educated adult.

Three witnesses testified to the fact that plaintiff was present when warnings were issued and, to paraphrase the language of the Louisiana Court, "it is certain that every crew member could have received the warnings"; "the failure of the plaintiff either to heed these warnings if heard, or, if not, to hear them or any of them, is not to be charged to defendant" and "these workmen came to this plant under the care and direction of the alter-ego of their employer, and the defendant had a right to suppose that they would so remain during their presence on its property."

Under the circumstances, plaintiff was **personally** warned of the danger, orally.

In addition, the evidence conclusively shows the existence of warning signs in the area.

Plaintiff testified that there were several metal signs in the area saying "Danger—13,000" and that they were placed on the fence or telephone pole (Record, p. 32).

The foreman, Edward G. Morgan, testified that he saw one sign indicating 13,000 volts and that there could have been others (Record, p. 21).

Plaintiff's fellow worker, Norman T. Owen, testified to the existence of signs on the gate or fence fully enclosing all of the transformers, saying "Danger—13,200 volts" (Record, p. 27).

Another crew member, Robert L. Sullivan, recalled signs posted in the general area which said "Danger" and recalled the voltage indication as 13,000 (Record, p. 36).

Cecil W. Shannon testified that there were signs indicating 13,000 volts and to be careful. He testified that there was such a sign on the gate leading into the enclosure from the river side, another on the wooden pole at the side of the ditch and also recalled one on the emergency transformer base (Record, p. 13).

Plaintiff's Exhibit 4 shows a sign on the wooden pole stating "Danger—13,200 volts," referred to by Mr. Youngs and Mr. Shannon in their testimony.

Defendant contends that the existence of these signs, placed at the entrance to the transformer area, on the pole immediately alongside the ditch where plaintiff was and had been working, and on the base of the emergency transformer, constituted a warning too clear to be ignored. This

warning was to plaintiff **personally** inasmuch as he not only could but did observe the signs.

Thus, irrespective of oral warnings, the signs warned plaintiff of the presence of 13,200 volts of electricity, a voltage which plaintiff knew to be too high to be insulated against.

Therefore, the jury could not have found the plaintiff was not warned, and, under the doctrine announced in **Gowing v. Henry Field Co.**, supra, that the sole duty was to warn, defendant's Motion for Directed Verdict should have been sustained.

Even should this court hold that the jury might properly have found that plaintiff had not been apprised, either of his own knowledge or by the existence of warning signs, of the peril involved, the defendant cannot be held accountable, because it unquestionably informed plaintiff's superior and thereby discharged its duty to warn.

Cecil W. Shannon testified, "I told the foreman of the hazards surrounding these transformers, repeatedly" (Record, p. 11), and that the foreman he warned was Mr. Morgan. He further testified, "Every day when they were working in that area I was there to see how the job was progressing, and at all times I went there I stressed the fact that they must be careful of the transformers because they were hot" (Record, p. 13).

Herman C. Heinsen, defendant's Superintendent of Power, testified that prior to the accident he advised Mr. Morgan to be careful in that transformer area and that this equipment was energized (Record, p. 38).

Roy J. Stapleton testified to having warned Mr. Morgan, as well as Mr. Youngs, prior to the accident (Record, p. 39).

Mr. Morgan acknowledged having received warning that "It was all hot" (Record, p. 18) and that this warning came from Shorty Stapleton (Record, p. 20). He also testified, "I personally knew that these transformers were hot" (Record, p. 20). In addition, he recalled having testified in a prior deposition that Mr. Stapleton said that everything in there was hot—they were all hot, as well as that Mr. Herman Heinsen had told him the transformers were hot (Record, p. 21). In that deposition he testified that Heinsen was referring to the whole bank—all of it and had said, "All that stuff is hot in there" (Record, p. 21).

He testified that no particular reference was made to the transformer banks other than that it was hot (Record, p. 18), and recalled having testified in a prior deposition that he told the men that the **wires** were hot and the **transformers** were hot (Record, p. 21). It is clear that Mr. Morgan had been informed of the fact that the entire area was hot, that the transformers specifically were hot and, had either been warned or knew of his own knowledge, that the wires were hot.

In addition, Mr. Guy Muter, who was identified by Mr. Youngs as the Superintendent of Pittsburgh who had been sent by it to take care of the job (Record, p. 32), had been warned of the danger.

Christian S. Hartman, defendant's electrical engineer, testified that during Mr. Shannon's vacation he conferred with Mr. Muter on several occasions, all preceding the accident. He warned him of the danger and the necessity of precaution (Record, p. 37).

It is clear that plaintiff's two superiors, Mr. Muter, who had responsibility for the entire operation, and Mr. Morgan, who was plaintiff's immediate superior, were fully apprised of the facts. Defendant contends that whether

or not this knowledge was conveyed to plaintiff, the defendant had discharged its duty to warn.

To hold that the duty to warn, imposed upon a property owner by the holding in Gowing v. Henry Field Co. extends to notifying each individual employee of the contractor, would be unreasonable. In many instances, one who engages the services of a contractor never comes in any contact with the contractor's employees. In this instance there was some contact, but even here, the record discloses that various employees of Pittsburgh were engaged, and came on the job, at different times. In addition, the employees were under the exclusive control of Pittsburgh and the right of any representative of Clinton Foods to approach them is questionable. If a property owner were to suggest that the employees of his contractor cease work while he talked to them, the contractor might well consider it an unwarranted invasion of his right of control.

Defendant has found no Iowa decisions upon this point. However, an analogous situation is presented where an injured third party, an invitee of a lessee, attempts to recover of the lessor for failure to warn of defects on the leased premises. The Supreme Court of Iowa has consistently held that a lessor, fully aware of latent danger existing in the premises involved, has discharged his liability, even toward an invitee of the lessee, by warning the lessee—the person with whom he is in privity.

In **Willis v. Snyder,** 190 Iowa 248, 180 N. W. 290, the Iowa Supreme Court was faced with the following situation. The facts appear from the quotation:

> "Plaintiff is the mother-in-law of Ralph Vanderpool, who, she alleges in her petition, on April 1, 1918, orally leased the dwelling house referred to from the defendant, coupled with an agreement as a part

thereof to keep the premises in repair and suitable for use; that the steps leading from the front porch to the walk or ground below became defective and in a dangerous condition; that on or about April 6th the lessee notified the lessor thereof and that he agreed to immediately repair the same, but that he negligently failed to do so; that on the evening of April 26th, while on said steps, they gave way, causing her to fall, with the result that she was severely and painfully injured. The petition is in two counts. In the first negligence based upon the alleged failure of the lessor to, within a reasonable time after notice of the defective and dangerous condition of the steps, cause the same to be repaired is alleged, and in the second it is charged that the condition of the steps was such as to amount to a nuisance.

* * * * * * *

"In the absence of an express agreement to repair, the liability of the lessor is limited to damages caused by the defective condition of the premises, **where the defect was known to the lessor at the time the lease was entered into, which he concealed from the tenant, or failed to call to his attention.** * * * Independent of the alleged agreement (to repair) defendant owed no duty to his lessee to make repairs, except as above pointed out. His obligation, whatever it was, was contractual and did not arise out of a duty imposed by law.

"No greater obligation was imposed upon the lessor by express notice of the alleged defective condition of the steps than that created by the agreement to make repairs, except, perhaps, the duty of the lessor to make repairs at all would make such agreement commence only after notice to him that same was necessary. An implied duty, under a contract by the lessor, to keep the premises in repair, would no doubt rest

upon the tenant to give notice of defects to the lessor. As a cause of action in tort cannot be predicated upon a breach by the lessor of an agreement to make repairs, and as the liability of the lessor for damages suffered by the lessee on account of the defective condition of the premises arises **only when the defect existed at the time the lease was entered into and was known to the lessor and concealed by him from the lessee,** no liability is shown. Except where a duty is imposed by law upon the lessor to make repairs, no higher or greater duty than that derived from the contract could be imposed upon the lessor by notice of the defects." (Emphasis supplied.)

The Supreme Court of Pennsylvania decided the question presented here in **Engle v. Reider,** 366 Pa. 411, 77 A. 2d 621.

In that case the plaintiff sued for the death of her husband which she alleged to have been caused by the presence of carbon monoxide gas from a hot water heater in defendant's building located in an area in which decedent had been working. The suit named the property owners and the husband's employer as defendants and the plaintiff recovered a verdict against the employer. Judgment was rendered for the defendant property owners and a motion for a new trial was denied, which ruling was appealed.

The court found that the hot water heater in question was in a small closet on the second floor of defendant's building and, although provided with an opening for the purpose, it had not been fitted with a vent to carry such fumes. Rather, they were discharged through a hole in the ceiling into an attic which the court characterized as "a reservoir for the accumulation of carbon monoxide gases." Defendants had been advised by the contractor who installed the heater that a vent should be attached

and he recommended a tinner for the job but they took no steps to correct the condition. At different times thereafter their attention was called to the danger and they were urged to correct it but nothing was done. Decedent was an employee of a contractor who had been engaged to install a furnace near the heater. It was necessary to run a wire through the area in which the gas had accumulated and while doing so, decedent was overcome and died.

The contractor testified that he had been on the premises on several occasions and noticed the lack of a vent and that he was aware of the danger and had discussed the matter with one of the defendants. He had informed a co-employee, Smith, but had not warned decedent.

The following quotation constitutes what the Supreme Court set out of an instruction which it approved, and indicates the reasons therefor:

> "The learned trial judge charged the jury, that, while he would leave it to them to decide, it seemed to be undisputed that the contractor Routman, well knew that there was a dangerous situation there caused by the failure to have a vent pipe that would carry the carbon monoxide fumes into the open air, and had warned his employee Smith accordingly. The jury was then instructed that 'The extent of the duty of the owner of the building who employs an independent contractor to the latter's employees (that is, Routman's employee, Engle) with respect to known or discoverable dangerous conditions existing on the premises where the work is to be done, is to warn the contractor of their existence; **he is not required to warn every subcontractor and laborer who comes on the premises.** In this case, * * * **the Reiders had no obligation to warn Engle, an employee of Routman.** His full duty was performed with regard to this dan-

gerous condition when he warned the contractor Routman. If you find that he did warn the contractor Routman; or, if you find that Routman did not need to be warned because of his superior knowledge of the danger of unvented flues, or because of his having visited the premises five or six times he saw, or ought to have seen this obvious danger and realize it—and he says he did—then Reider's full duty to those business visitors, Routman and Engle, was to notify Routman, or be sure that Routman knew of the existence of this condition which was dangerous; and if he had done that he did not need to go farther; **he did not need to go as far as to notify Engle.**' The court further charged the jury that 'the burden is affirmatively on the plaintiff (Mrs. Engle in this case) to prove the employer's (owner's) (Reider's) failure to notify the contractor of the existing dangerous condition. There was no attempt made to show that. As a matter of fact, on cross-examination of Routman it was developed that Routman did know of the existence of this dangerous situation, and that he did nothing about it, except, as he says, that he warned Smith not to, under any circumstances, go up into that cubbyhole in the roof without first turning off the gas for a sufficient length of time to have the carbon monoxide gas dissipated. He doesn't say that he notified Engle; that wasn't developed. The burden is upon the plaintiff to show affirmatively that the Reiders did not notify the contractor.' (Emphasis supplied.)

"These instructions were in complete accord with the law of Pennsylvania on the subject thus discussed. In Newingham v. J. C. Blair Co., 232 Pa. 511, 81 A. 556, the following quotation from White's Supplement to Thompson on Negligence, sec. 979:

'It is the rule that the owner of property owes to an independent contractor **and his servants a**:

> **work thereon** the duty of exercising reasonable care to have the premises in a safe condition for the work, unless the defects responsible for the injury **were known to the contractor.**' (Emphasis by the court.)

was commented upon as enunciating a 'sound general rule.' Authority to the same effect is to be found in Nettis v. General Tire Co. of Philadelphia, Inc., 317 Pa. 204, 177 A. 39. There then following the decision of this court in Valles v. Peoples-Pittsburgh Trust Co. 339 Pa. 33, 13 A. 2d 19, where the subject of the liability of a property owner to the employees of a contractor called to work upon the premises to warn such employees against latent dangers was comprehensively discussed in an opinion by Mr. Justice Linn and it was held that the extent of the duty of the owner of a building under such circumstances was to warn the contractor of the existence of dangerous conditions, but that **he was not required to warn every sub-contractor and laborer who came on the premises,** —that his responsibility to an independent contractor's employees while performing the contract on his premises was not the same as his responsibility to his own employees; furthermore, that it was a necessary and essential part of the plaintiff's case to prove that the property-owner failed to notify or warn the contractor and that the latter did not have knowledge thereof. In the present case plaintiff made no attempt to prove that the contractor was uninformed as to the danger; on the contrary, the contractor himself testified that he was fully aware of it and had discussed it with defendants themselves. If, as the court instructed the jury, they believed Routman's testimony to that effect, their verdict in favor of defendants necessarily followed from the law laid down in the Valles case." (Emphasis supplied.)

One justice dissented and expressed his feeling that the majority opinion had extended the rule of Valles v. Peoples Pittsburgh Trust Company beyond its logical application. However, he did not attack the rule laid down in that case but pointed out that in that case the ammonia pipes involved had been properly installed, whereas in the case at issue the

> "**lack of a vent** for the gas water heater • • • **was neither a proper nor an essential type of installation;** • • • Yet, he knowingly persisted in maintaining in his building a veritable lethal chamber which caused exactly what he must have known it was certain at some time to cause, namely, the death of a human being.
>
> "• • • The instruction gave Reider far more than he was entitled to under the evidence which warranted a jury's finding that his actions in the premises constituted **reckless and wanton negligence,** nothing less. And, just as contributory negligence is no defense to an action for another's **reckless** and **wanton** misconduct (citing cases), by like token, one does not exculpate himself from liability for his **reckless and wanton negligence** by warning another of it." (Emphasis supplied by dissenting justice.)

It is interesting to note that in **American District Telegraph Co. v. Kittelson,** cited in Point I hereof, Judge Graven apparently construed the Iowa Law as we contend it to be, in instructing the jury as to Armour & Co.'s negligence that "the failure to warn the defendant **or its employees** of such hidden defect, danger or pitfall constituted negligence."

The defendant feels that these cases support its contention that its duty was to warn only Pittsburgh, with which it was in privity, and did not extend to warning the individual employees of Pittsburgh, with whom it was not.

Therefore, the duty to warn established in Gowing v. Henry Field Co., was discharged by the warnings to Mr. Muter and Mr. Morgan.

III.

The Negligence of Plaintiff's Employer, Pittsburgh Piping & Equipment Company, Was the Sole Proximate Cause of the Accident and the Injuries to Plaintiff, and Defendant Cannot Be Held Accountable.

Not only was Pittsburgh an independent contractor, in undertaking this work (Record, p. 33), but it had undertaken to furnish all labor and materials, tools, supervision and methods as outlined in the specifications, and equipment and transportation necessary for proper execution of the work (Record, pp. 33 and 34).

The plaintiff stipulated to the foregoing facts as stated but objected to introduction of them on the ground that the duty to provide safeguards and a safe place to work was non-delegable. Plaintiff also argued in opposing defendant's Motion for Judgment Notwithstanding the Verdict that defendant could not delegate these duties and thus could not relieve itself of the obligation.

This is not a question of whether defendant could delegate duties owed by it. The duty to provide a safe place to work and to provide safeguards never fell upon the defendant. Its duty was as stated in Gowing v. Henry Field Co. and did not include these obligations. As is argued in Point II hereof, its duty to warn was not delegated to Pittsburgh but was **discharged** by warning Pittsburgh.

On the other hand, the duty to provide a safe place to work, and to make or request all changes necessary to make and keep it safe during the progress of the work, was upon Pittsburgh.

In **Reilly v. Chicago & N. W. Ry. Co.**, 122 Iowa 525, 98 N. W. 464, the plaintiff was employed by an independent contractor who had engaged to raise a portion of the road-bed and track of defendant. Dirt containing stones had been piled about 3 feet high alongside the track and had been shoveled beneath the track after it was rased. While plaintiff was working near the track, defendant's train went by at a high rate of speed and its pilot wheel struck a stone which had presumably rolled down from the pile, throwing it against plaintiff and breaking his leg.

Plaintiff conceded that, if the negligence was solely that of his employer, he could not recover, but alleged that the defendant was negligent (1) in allowing the dirt to be placed so close to the track that stones might roll from the dump and become a source of accident or danger from moving trains; (2) in running its train at a recklessly high rate of speed in view of the danger at that point; (3) in failing to order a reduction of speed by its trains at that point; and (4) in not having an overseer or guard of some kind at the place to keep the track clear.

In discussing the respective duties owed plaintiff by the defendant and by his employer, the Court said:

> "But can it be said that there was any neglect of duty owed by defendant to plaintiff in these respects? If plaintiff were a passenger or employee upon the passing train, and by reason of such obstruction or the dangerous proximity of the dump the train had been derailed, resulting in his injury, we can readily conceive of circumstances under which the company might be made liable for the act or omission of the contractor, for one who is personally bound to perform a duty—as, for instance, a master, who is bound to furnish his servant a safe place in which to work; or a common carrier, who is bound to exercise care for the

safe transportation of passengers and freight—cannot relieve himself from the burden of such obligation by any contract he may make for its performance by another person. Shearman & Red. on Neg. (5th Ed.), p. 14. But plaintiff was neither a passenger on defendant's road nor an employee in its service. True, there was a measure of duty from the latter to the former, for the plaintiff, as the employee of the contractor, had a legal right to be where he was, and defendant owed him reasonable care to avoid injuring him by its acts, or by the manner in which its own employees performed their several duties. We do not think, however, that it was under any leal obligation to guard or protect the plaintiff against the consequences of the negligence of his immediate employer. To illustrate: if, by reason of the negligence of the trainmen, a coupling pin lying upon the platform of the car had been hurled through the air, striking the plaintiff (Doyle v. R. R., 77 Iowa 607, 42 N. W. 555, 4 L. R. A. 420), or if the passing train, instead of colliding with a stone left upon the track by the contractor, had struck a sledge or pick carelessly left there by defendant's section crew (Tex. & Pac. R. R. v. Carlin, 111 Fed. 777, 49 C. C. A. 605, 60 L. R. A. 462), a very different question would be presented. There is nothing in the record to indicate that defendant ordered or required the contractor to dump the dirt so near the track as to create danger of this nature. It does appear that the contractor was required and undertook to keep the track clear from obstructions. There is no principle of law which required the company to supervise the contractor in the performance of this duty as a measure of protection to the contractor's servant. So far as appears from the record, the defendant had no power or authority to control the means or methods to be employed by the contractor in doing the

work. It did require certain results—certain things to be done—and had an engineer to see that the work done was of the kind and quality contracted for, but as to the methods of the work and the control of the employees therein the contractor was entirely independent of its dictation. The duty of furnishing plaintiff a safe place to work and exercising care and supervision to maintain such condition of safety rested upon the employer alone, and (unless it be under extraordinary circumstances, which do not here obtain) that obligation cannot be extended to include the party for whom the contractor had undertaken to perform the work. Miller v. R. R., 76 Iowa 655, 39 N. W. 188, 14 Am. St. Rep. 258; Branstrator v. R. R., 108 Iowa 377, 79 N. W. 130; Humpton v. Unterkircher, 97 Iowa 509, 66 N. W. 776; Brown v. McLeish, 71 Iowa 389, 32 N. W. 385."

If the area, into which Pittsburgh contracted to take its employees, was unsafe, and Pittsburgh could not render it safe, Pittsburgh was negligent in contracting to do the job. Pittsburgh not only contracted to do this job and assumed a burden imposed by law to provide a safe place for its employees but specifically agreed by contract to furnish all labor, material and tools and to supervise the execution of the work.

It entered into a contract involving some danger to its men with full awareness of that danger and, it is to be assumed, took that danger into consideration in determining the compensation which it would exact for performing the work.

If the Record discloses that the plaintiff, Mr. Youngs, was not personally warned by Pittsburgh that failure to warn and thus aid in rendering the area safe for its employees, was negligence on the part of Pittsburgh. There

is no question that Mr. Guy Muter who was in charge of the entire project for Pittsburgh had been warned. Neither can it be doubted that Mr. Edward G. Morgan, plaintiff's foreman, had been warned. In addition, Mr. Morgan testified "I personally knew that these transformers were hot" (Record, p. 20). Therefore, if the proximate cause of the injuries suffered by plaintiff is found to be the fact that he was not aware of the danger, it was occasioned by the negligence of his employer which was well aware of the situation and which was under a legal duty to provide a safe area in which he could work.

Christian S. Hartman, defendant's electrical engineer, testified to a conversation with Mr. Guy Muter in which he said, "We offered to provide rubber blankets, or if needed, a protective barricade if he wanted them. He responded that no one had been hurt up to that time. He refused my offer and never after that solicited, from me, similar safeguards" (Record, p. 37). It appears from the record that no one else from Pittsburgh ever solicited any safeguards from any member of Clinton's personnel.

Again, Pittsburgh was negligent in turning down a proffered opportunity to avail itself of safeguards which would have helped it to discharge its legal obligation to provide its employees a safe place to work.

In examination of Cecil W. Shannon, and various other witnesses, the plaintiff questioned at length whether the existence of "shut-off" switches which would have deactivated the transformers was ever revealed to plaintiff or any of his fellow employees. It matters not whether they were informed of the location of the switches. Certainly they were aware that there was a way to shut off the transformers. Else Mr. Youngs could hardly have felt that the emergency transformers were harmless. Yet, nowhere in the record is there any evidence that any member of the

Pittsburgh crew requested that the transformers be shut off. In fact, Mr. Morgan (Record, p. 22) and Mr. Youngs (Record, p. 33) both testified they did not make such a request.

Mr. Shannon testified, in explanation of why the defendant did not disconnect the transformers, that such action would have involved many hazards. His most comprehensive testimony as to these hazards appears in the Record at pages 12 and 13. His testimony gives rise to serious doubt as to the advisability of turning off the emergency transformers in order to render the area innocuous.

Be that as it may, the responsibility did not rest with Clinton to turn off the power, at least in the absence of a request by Pittsburgh that such be done. Clinton's duty did not extend to providing a safe place to work but Pittsburgh's did and it devolved upon Pittsburgh to request that the power be shut off. This it could have done, either at the inception of the contract by refusing to contract to send its men into an area of known danger, or during the progress of the work.

Therefore, if the failure to turn off the power leading to the transformers was the proximate cause of the accident and consequent injury to plaintiff, it was the negligence of his employer, not that of the defendant.

Plaintiff introduced evidence tending to show that the methods utilized by Pittsburgh in endeavoring to position the pipe in the ditch which it had prepared were feasible and proper methods of doing the work. It is doubtless true that in view of the equipment on hand, the use of a chain-fall or hoist, which necessitated the presence of the plank upon which plaintiff was standing at the time of his injury, was proper. However, Mr. Morgan testified, "We

maneuvered the pipe into position by hand. **We usually use a crane but we didn't have any.** Some of it we rolled in, dropped on blocks, and some we drifted in with a chain" (Record, p. 16). There was no evidence that the area was inaccessible or that its characteristics did not permit the use of a crane as was ordinarily the practice. The reason, according to Mr. Morgan, was "We didn't have any."

Certainly Pittsburgh, having the responsibility of providing all materials and tools as well as determining methods of performing the work, is chargeable with negligence in not providing the equipment normally used in work of this kind, which equipment might well have avoided the injury to plaintiff.

It is equally obvious that Clinton, retaining no control of the methods used in doing this work, and having only the right to demand that it be done according to the specifications contained in the plans for the project, was not negligent in this respect.

Therefore, if the methods utilized were improper, and negligence in their use was the proximate cause of the accident and injury to plaintiff, such negligence is chargeable to plaintiff's employer, Pittsburgh, and not to the defendant.

Defendant contends that irrespective of what act might be found to be negligent and to have constituted the proximate cause of the injury to plaintiff, it was an act of either plaintiff or his employer and defendant cannot be charged with responsibility.

(IV eliminated as dealing with a point not now under consideration.)

CONCLUSION.

It is urged that, for the reasons shown in the foregoing Statement of the Case, Authorities and Argument, the trial court erred in submitting the case to the jury, and that the Judgment entered on September 13, 1956, should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,887.
Civil Action.

CLINTON FOODS, INC., a Delaware Corporation,
Appellant,

vs.

MARVIN YOUNGS,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

APPELLANT'S REPLY BRIEF.

(Foreword eliminated as dealing with matters not now under consideration.)

REPLY TO APPELLEE'S I.

Appellee contends that the danger involved was not apparent. He discusses the location of the wire, the apparent insulation of it, and the fact that these were emergency transformers, and states that the lead-in wire was the only hazard in the area.

In our original brief, we discussed Mr. Youngs' experience with, and knowledge of, electricity. At the very least, he knew that some of the wires attached to the transformers carried 13,200 volts. He was not justified in assuming which was which. The statement that this was the

only hazard in the area is not correct. Mr. Shannon pointed to other wires, appearing on the exhibits, which were "hot" though at a lower voltage (R. p. 9).

It is claimed that Youngs was misled by the fact that the wire was neither out of reach nor buried. Yet, as appellee states on page 12, the wire "under normal conditions would have been far above his head." It would be as logical to contend that, if the wire had been buried but had been unearthed and exposed during the progress of the work, one would be misled by the fact that it was then accessible.

Mr. Youngs assumed that the emergency transformers were dead. He says that from some unidentifiable source, he learned that they were emergency. His assumption contrasts directly with that of Mr. Morgan that all transformers are hot (R. p. 20). We feel that it is common knowledge that in hospitals and plants which have a need for emergency power, the emergency transformers are almost invariably active at all times.

Certainly Mr. Youngs had no right to rely upon his unverified belief that the transformers in question were dead.

Appellee infers that it required the evidence of a Master of Science to bring out the fact that the electricity would arc ½ inch. We submit that **any** witness in this action could have testified that it would arc. Quite likely the average person would expect the arc to be greater than that and would hesitate to hazard a guess as to the distance. Perhaps it took an expert to establish the limit of the arc. Mr. Youngs, with his greater than average experience, knew that it would arc. Else why would he not "have gotten within three feet of it"?

The extent of the arc is so negligible as to render its existence immaterial. Can it be contended that, if Mr. Youngs was aware of the hot wire, he could reasonably

assume that he was safe so long as he didn't actually touch it—so long as he stayed a fraction of an inch away?

Appellee sets out three points upon which he claims reasonable minds could differ. Only the third of these would be a basis for a verdict. Defendant is not liable even if it originally created the danger, nor is it liable if it had exclusive control unless there was no warning.

The warnings that "everything in there was hot" and the "area was hot", were sufficient. Obviously, they could not be taken literally. The open areas could not have been hot for example but it cannot be contended that these warnings were insufficient. They would put any reasonable person on guard that anything, not obviously innocuous, was a possible source of danger.

The warnings as to the bus-bar did not minimize the general warning. They came at a time that the men were getting dangerously close. They no more lulled the plaintiff into a false sense of security than would the warning of a mother as to the imminent danger of a car bearing down on a child, cause the child to disregard a general warning to watch out for cars, trucks and buses while crossing the street.

The argument that Mr. Muter and the others being warned did not comprehend the warnings is specious. All of them were adults. They did not have to be electrical experts to understand that the area was "hot." If they could not appreciate that term, more specific warning would have been useless.

Under the doctrine of **Gowing v. Henry Field Co.**, warnings were sufficient regardless of circumstances. Therefore, the argument on page 16 of Appellee's Brief cannot prevail. The jury was foreclosed, **as a matter of law**, from concluding that warnings were not all the defendant could have been expected to do.

Appellee cites the note in 31 A. L. R. 2d 1375, to distinguish the Deaton case which was cited in Appellant's Brief. In that case the condition which the plaintiffs sought to remedy was the condition of the **poles.** The wires, including the one which electrocuted the plaintiff, were in good condition. The work in which plaintiff was engaged **at the time of the injury** involved merely the placing of new poles and not the transfer of the wires. He, too, was working in an area which brought him into proximity to a dangerous instrumentality. The South Carolina Court did not base its decision upon the rule cited by appellee, but upon the holding of **Gowing v. Henry Field Co.** and similar cases.

Appellee mistakes our intent in citing the Willis case. It was cited for the purpose of developing the proposition, borne out by **Engel v. Reider,** that where the duty to warn exists, it is discharged by warning the person with whom the owner is in privity.

Appellee attempts to dispose of **Gowing v. Henry Field Co.** summarily by pointing out what he considers distinguishing facts. The Court did not say "where plaintiff created his own danger the only duty is to warn," nor did it condition its definition of the duty upon the premises being "perfectly safe" in ordinary use. It said the duty is "to warn him of any **danger.**" As appellee points out, this case imposed a duty to use reasonable care. Everyone has the duty to use reasonable care to avoid injury to others. Appellee does not point out that the court not only **stated** this duty but **defined** it.

The Hull case also states the duty. It does **not** overrule nor even mention Gowing v. Henry Field Co. The court held that a jury question was presented as to whether precautions which had been taken satisfied the requirements of a statute which provided that every elevator and opening "shall be so constructed, guarded, equipped, main-

tained, and operated as to render it safe for the purposes for which it is used * * *."

In a 5-4 decision, the court held that the statute was applicable and that its terms were so general that a jury could properly pass upon whether or not it had been complied with. The dissenting members of the court did not cause their dissent to be published, but their reasoning can be obtained by reading the majority opinion in the original decision, superseded by this decision, which appears at 24 N. W. 2d 364.

In **Stupka v. Scheidel**, there was no warning of danger. On the contrary, engaging one to wash windows—a job which will normally entail reliance upon the screw eyes—amounts almost to a warranty that they are safe. In effect, the defendants were providing part of the equipment used **in performance of the work.** We agree that, having invited plaintiff to **use the screw eye**, defendants were bound to discover any defect and **make** it reasonably safe.

Steele v. Grahl-Peterson does impose the duty of exercising reasonable care to avoid exposing others to injury, but the contention that the duty established is the same as that owed to an employee, is misleading. The Court stated that the duty to "keep" the premises in a safe and suitable condition was the same as that imposed upon an employer. It imposed no duty to "make" them safe.

The defendant had replaced a burned out floor with concrete, designedly leaving a hole in it. The concrete was not supported at an edge of the hole and crumbled under plaintiff's weight. The weakness was hidden by the concrete, and the workers in the area assumed the floor was safe. It was alleged that the defendant failed to furnish a safe place to work, failed to give notice of the defect, and failed to properly guard the opening. The Court cited with approval, **Samuelson v. Mining Co.**, 49 Mich. 164, 13 N. W. 499, to the following effect:

"Every man who expressly or by implication invites others to come upon his premises assumes as to all who accept the invitation the duty to warn them of the danger in coming which he knows or ought to know of and of which they are not aware. This is a very just and very familiar principle."

In discussing whether or not there was evidence to support any allegation of negligence the court held that the jury could have found that the floor was defective and the defect was hidden by the concrete. Thus, the defendant was affirmatively negligent in **creating** the defect and hiding it. In discussing assumption of risk, the court said:

"True the hole through the floor was patent to the eye and plaintiff assumed whatever risk was naturally incident to stepping over it or about it, but no negligence is charged on account of the existence of the hole. The alleged negligence consisted in the defective condition of the flooring near the hole, and this defect, and not the hole through which he fell, is relied upon as the proximate cause of plaintiff's injury. If this defect was concealed, or not open to casual observation, as plaintiff's evidence seems to show, he was under no duty to make minute investigation, but could rightfully assume that defendants had performed their duty providing a reasonably safe support for the floor or concrete on which he was expected to walk and work."

That the defendant did not "keep" the area safe, which was the basis of the decision, is obvious. Where the work done results in creating, or failing to remedy a dangerous condition, a third party, whether an employee of a subcontractor or any other visitor, can look to both the owner and the contractor who did the work and demand a safe place in which to be. The Court approved the very rule upon which we rely—that it is the duty of the owner to

warn of dangerous conditions. In fact, Steele v. Grahl-Peterson was the authority for the decision in Gowing v. Henry Field Co. Therefore, it is obvious that the Supreme Court of Iowa found nothing inconsistent with the doctrine which it stated in Gowing v. Henry Field.

Appellee's contention as to the intent of the Court in the Neimeyer case is incorrect. The discussion of control of the machinery was to develop the fact that Kessler was **not** an independent contractor. The Court viewed Kessler's "employment" as involving the conversion of wood blocks into shingles, using the defendant's equipment, and said:

> "It seems to us to be a question of the liability of the defendant for its own negligence. In the cases cited, the employment of the contractor is that of independent character. * * * It seems to us that this case is widely different from those cited * * *. He undertook to furnish the labor by which the company could, in **its mill**, and by **its machinery** and appliances, **owned** and **operated by itself**, manufacture the shingles. Kessler had no more control or authority over the machinery than he would have had had he worked by the day or week. We think the obligation of the defendant company as to care in keeping in repair and operating the machinery, as to Kessler himself, was the same under the contract by which Kessler was to do the work at so much per thousand, **as if he did the work by the day or week.** Kessler was **not to manufacture** the blocks into shingles but **only to do the manual labor** for the purpose, and **the defendant was to do the rest**; that is, to **furnish and operate** the machinery for that purpose. The rule of reasonable care obtains under such an **employment.** The stipulation of facts shows that in the employment, the defendant knew that others than Kessler would work about the machinery it was to operate, and we think the same care and diligence obtained as to such

employees, although under the immediate employment of Kessler." (Emphasis supplied.)

The Court reached the conclusion that a company which procures the services of a person termed an independent contractor to manufacture its product in this manner cannot thereby avoid its duty, **as a master**, to provide a safe place to work. Otherwise, any plant could avoid the duty by designating all of its foremen as independent contractors and letting them hire the rest of the employees. The Court did not disagree with the rule upon which the directed verdict was based, but said that the case was distinguishable.

We are not attempting to persuade this Court that one in Youngs' position has no better status than that of a bare license. On the contrary, the rule announced in Gowing v. Henry Field was applied to invitees. The court specifically stated that "plaintiff was an invitee and it was defendant's duty to warn". Therefore, Clinton was precisely as liable to him for its own acts as it would have been to those used as examples by appellee. However, its acts of negligence would consist, under Iowa law, wholly of failure to warn.

We submit that the case of **Buck v. Walsh**, tends to bolster our theory of the case more than it does that of the appellee.

In connection with **Yarn v. Ft. Dodge D. M. & S. R. Co.**, we point out the fact that defendant supplied electricity to approximately 17 business places and therefore was subject to the provisions of Chapter 389.15 of the Code. In addition, the opinion of this Court states that "the defendant then strung a 22,000 volt uninsulated wire in close proximity to a conductor, a pipe, it knew someone would be working on." The case differs from the one at bar because Youngs was not doing work which was fore-

seen at the time the equipment was installed, but was engaged in a project which had not even been conceived at that time.

In **Reynolds v. Iowa Southern Utilities Co.**, the presumption created by Section 389.15 was applicable. In addition, lines which could have been adequately insulated but were not, passed through a tree and were permitted to remain although it was common knowledge that boys had played in the trees for several years, and the "wires had a ragged appearance and in this particular tree snapping and sparks had been observed for a considerable period of time."

In **Detroit Edison Co. v. Ewing**, the defendant, an Electric Public Utility Company, had installed wires carrying 110 volts, which were not taped or insulated, and which were left with the ends sticking up about two inches.

In the **McCready case** the defendant moved into a new building before completion and, disregarding the presence of workmen on the premises, ran power into the area where plaintiff was working. Until three days prior to the accident no power had gone into these wires. It was then turned on and left on despite requests by plaintiff's foreman that it be turned off. It created a dangerous condition which had not existed at the inception of the contract. This was an affirmative act of negligence. The Court pointed out that while the defendant was under no **affirmative duty** to keep the premises safe, it was under the duty to refrain from **actively creating** a danger. Similarly Clinton was under no "affirmative duty" to shut off the power, but was under a duty to refrain from "actively creating a danger." It did not violate that duty.

The California Court commented upon the unexplained refusal to shut off the power. In the Youngs case we did not refuse, for no request was made, and we have explained why the power was not shut off.

The Court also specifically recognized the different rule prevailing in that state between an ordinary invitee and an employee of an independent contractor, likening the duty toward the employee to that owed the contractor. In view of Gowing v. Henry Field, there is absolutely no difference in Iowa between the duty owed a contractor and that owed any other invitee. In Iowa, the duty owed is identical, notwithstanding California law on the subject.

The Theissen, Dunn and Jordan cases involved plaintiffs who were not experienced with electricity and did not know it would are. Mr. Youngs knew that it would.

Appellee cites but does not argue **Public Service Co. of New Hampshire v. Elliott.** There, although the [illegible] posed parts were within reach from the floor, and although defendant's employee had led plaintiff into a high-tension room and by "positive conduct" brought him into the danger zone, the Court held that adequate warning, as a "more practical alternative" than shutting off the power, would have sufficed.

Appellee cites Restatement, Torts, Section 343, which merely distinguishes between the duty owed to a bare licensee and that owed to a business visitor, the distinction being that as to the former, the owner is bound only by his actual knowledge, but toward the latter he is chargeable with constructive knowledge and must seek and become aware of any dangers.

Appellee also cited the Texas case of **Smith v. Henger.** There Henger had expressly assumed all duties of the owner. Plaintiff fell into a hole which had cutomarily been covered by timbers which in turn were covered by canvas. The hole had been so covered when he left work the night before the accident, and appeared the same the next morning. The Court held that whether or not it was a direct employee of the contractor who had removed

the timbers, it was up to him, because of his control of the entire project, to ascertain the situation and guard against it. Although **an affirmative** act, by someone under his jurisdiction, had made the area unsafe, the Court limited the negligence of the contractor to his failure to ascertain and **warn of the danger** and cited the Iowa case of **Gardner v. Waterloo Cream Separator Co.**, 134 Ia. 6, 111 N. W. 316, as authority for the latter proposition.

REPLY TO APPELLEE'S II.

Appellee shrugs off any negligence of Pittsburgh by maintaining that such was merely concurrent with that of Clinton and by contending that Clinton is trying to escape by delegating duties owed by it. If our contention is correct and Clinton's sole duty was to warn, if necessary, that is the only duty which it could have attempted to delegate. It did not have the duty of providing a safe place to work nor the duty—at least in the absence of a request—to shut off the power or to provide barricades. Therefore, there is no attempt to delegate these duties.

Appellee states that if Pittsburgh was negligent in contracting to do the job in an unsafe place, Clinton was concurrently negligent. If Clinton was negligent in this respect, anyone who contracts to buy dynamite is negligent in entering into a contract whereby the manufacturer finds it difficult or impossible to discharge **his** duty to provide a safe place. Clinton's only duty was to warn. In warning the employer, Clinton did not delegate its duty—it **discharged** it. Delegation of the duty would have occurred had Clinton relied upon a **third party** to warn Pittsburgh's men. To such a situation, the sections of C. J. S. and Am. Jur., cited by appellee, would properly apply.

While Mr. Shannon testified that he had noticed nothing that was not properly entailed in the work, it must be borne in mind that he is not a lawyer and did not view

the situation from the standpoint of Pittsburgh's duty to provide a safe place to work. Viewing the project from the standpoint of convenience, he approved the methods.

Pittsburgh undertook this job with knowledge of the "hot" area and with knowledge of the plans procured by defendant. It piled the dirt which rendered an otherwise safe condition hazardous and it, **not the defendant,** had the duty of providing a safe place to work.

It is unreasonable to contend that exclusive control was in the defendant. It reserved no control over methods utilized by Pittsburgh. The testimony that there was no place else to put the dirt cannot overcome the obvious fact that there was. There was a space approximately seventeen by eighteen feet, shown on Plaintiff's Exhibit 2, which could have been used. Pittsburgh could have wheeled the dirt out of the enclosure just as the pieces of pipe were brought in, had it been necessary. It cannot be inferred that the contract vesting control of the manner of executing the project in Pittsburgh, specified where the dirt was to be piled.

We do not accuse Pittsburgh of choosing the more dangerous of two otherwise equally desirable alternatives. Obviously it was more convenient for Pittsburgh to pile the dirt where it did than to put it elsewhere. However, the inconvenience or added expense of taking safety measures have never been held to excuse an **employer's** failure to provide a safe place to work.

Suppose that Pittsburgh had requested that the power be turned off. Clinton could have insisted that a qualified man be stationed at the switches. Would it not have requested, and with absolute justification, that Pittsburgh pay that man's salary? Is there any doubt that, had Pittsburgh suggested that it was necessary to find some other place for the dirt, Clinton would have acquiesced (although Pittsburgh had that right regardless) provided

that Pittsburgh did the extra work? Why? Because it had contracted to do a job at a contract price which, as in every contract, reflected the elements which made the project easy or difficult.

Control of the methods was exclusively in Pittsburgh and embodied the decision of where to place the dirt. True, Clinton could not delegate any duty owed by it, but neither could Pittsburgh delegate its duty to provide a safe place to work merely because it would thus derive benefits in the direction of convenience and reduced expense.

(Reply to Appellee's III eliminated as dealing with matters not now under consideration.)

REPLY TO CONCLUSION.

We must take issue with several statements of fact contained in appellee's conclusion. The record does not show that "defendant at all times had available devices calculated to shield the dangerous wires." It merely shows that defendant offered to provide such devices.

Appellee states that, at other times, "for purposes of its own convenience and presumably for the safety of those involved in the area" Clinton had shut off the power. This distorts the testimony of Mr. Shannon that they "have never been out of service unless we wanted to work on them" (R. p. 14), and ignores his testimony that "we have to work within inches of the hot wires frequently" (R. p. 10).

While appellee has attempted to extend the duty beyond that which the Iowa law establishes, he has repeatedly stated that if the duty is merely to warn, the question of adequacy is for the jury. He ignores the fact that his foreman "personally knew these transformers were hot" (R. p. 20) and told the men that the wires and transformers were hot (R. p. 21). Unquestionably, Morgan knew that the

wires were hot. Under the doctrine of **Engel v. Reider** (ignored by appellee), which is logical; has never been rejected by the Iowa Court; and which finds support in White's Supplement to Thompson on Negligence, Sec. 978, the duty extends only to warning the contractor if he is unaware and defendant "did not need to go so far as to notify" Youngs.

The jury could have found for the plaintiff only if it found that **Morgan** was unaware **and** had not been adequately warned. Reasonable minds could not differ as to this and no jury question as to adequacy of the warning was presented.

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

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Appellant,

vs.

MARVIN YOUNGS,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

APPELLANT'S ARGUMENT FOLLOWING WITHDRAWAL OF OPINION.

FOREWORD.

This argument is presented in the light of the Court's order of August 11, 1958, wherein it withdrew the opinions filed July 15, 1958, and granted appellee a rehearing. Appellant conceives that the points raised and urged by appellee in his Petition for Rehearing must have been the determining factors in the Court's granting of a rehearing and that the proper function of this argument is to respond to those points.

In briefs filed prior to the oral submission of the case, both parties discussed the matters raised in the Petition for Rehearing. However, it appears to appellant that appellee has unduly emphasized two factors present and has attempted to build them up to a status they do not deserve. Appellant therefore feels that it may have failed to devote sufficient effort toward discussion of these factors, to wit: the bus bar and warnings thereof; and the apparently insulated lead-in wire.

In directing this argument to these two factors, appellant in no sense intends to abandon or retreat from the points relied upon for reversal as set out in its previous briefs and arguments.

SIGNIFICANCE OF BUS BAR WARNINGS.

In requesting rehearing, appellee attempts to lead this Court to believe that **the pipe fitting crew**, of which he was a member, was repeatedly warned **by Clinton**, and that the members of that crew were misled thereby. Appellant contends that neither of these positions is supported by the record.

The testimony of the two employees of Clinton who testified to having warned about the bus bar indicates that the warnings about this hazard were given at the time that the ditch-digging crew was at work. On page 9 of the Record, Mr. Shannon, in his testimony about warning of the danger of the bus bar, indicates that he knew they were throwing dirt into the alley-way and creating a hazard. The pipe fitting crew did not throw dirt into the alley-way—that was done by the ditch diggers. He further testified that he went into detail one day over by the pump-house where it was 440 volts, "and where they were throwing dirt up there. * * * In that situation I specifically pointed out the bus bar because they had piled

the dirt so high you could walk right into it. I don't know who was present when I said that, I didn't pay any attention to the particular men" (Record p. 11). Is it likely that this warning was given to the pipe fitters who did not do any digging or throwing of dirt? Is it not more likely that this warning was given prior to the time that they ever entered the area?

Mr. Hartman testified to having warned Mr. Guy Muter about the bus bar but this warning came "at the time he first started digging in there" (Record p. 37): Mr. Youngs testified "I had nothing to do with the excavation of the ditch" (Record p. 28).

Mr. Morgan, appellee's foreman, testified that it was Stapleton who called his attention to the bus bar (Record p. 22). This Stapleton denies (Record p. 39).

There is no doubt that Morgan and the excavating crew had been warned about the bus bar. However, there is nothing to indicate that appellee had been warned about it by Clinton. No member of the crew other than Morgan testified to having been warned by Clinton.

Mr. Owen testified with reference to the warning about the bus bar, "It was Eddy told us. I don't know who told him. Nothing specific otherwise was called to my attention" (Record p. 26). On page 25 of the Record he identified "Eddy" as Mr. Morgan.

Mr. Youngs testified "Either Mr. Morgan or Mr. Owen made the statement about the exposed bus bar" (Record p. 31) and that the warning came at the time when the ditch was being laid out (Record p. 29).

If these men, particularly appellee, were misled by repeated warnings about the bus bar, the warnings must have come from their own foreman or fellow workers, not from Clinton. Incidentally, appellee testified to only one

warning about it. Clinton's warnings about the bus bar came at a time when the bus bar was a hazard to men other than appellee's crew, who were endangered thereby. It was perfectly reasonable to so warn.

In contending that the significance of the bus bar has been blown up beyond its proper proportion, we emphasize Mr. Youngs' testimony as follows: "**The exact location of that bus bar I don't know.** If I saw a bus bar I would recognize it immediately and I would know then where it was, **but I never actually saw the bus bar**" (Record pp. 30 and 31).

Does that testimony not indicate the truth of what significance was attached to this bus bar? Can the Court believe that it was constantly emphasized to the point that it became the sole danger in the minds of these men, and yet the appellee never even saw it?

We are constrained to call to the Court's attention statements appearing on pages 3 and 7 of the Petition for Rehearing which, if not actual misstatements, tend to mislead as to their import.

On page 3, appellee states that every witness repeats that the warning given was limited to the bare bus bar and that Morgan says his attention was never called to any exposed apparatus other than this bus bar. On page 7, he states that Morgan, Owen, Youngs and Sullivan all speak of the bus bar warning and that alone.

Mr. Morgan testified that he had received information that the area was all hot (Record p. 18) and that the person who said that all of this area was hot was Shorty Stapleton (Record p. 20). He further testified, with reference to Stapleton that, "He just said everything in there was hot. They were all hot" (Record p. 21) and that Mr Heinsen had told him, the whole bank was hot (Record p. 21).

Mr. Sullivan testified that he was warned that the whole place was hot (Record p. 35).

Appellee relies in part upon the testimony of the witness Owen that the men had been told that the bus bar was the only thing to worry about and that Morgan had so informed them. In view of Mr. Morgan's testimony as to what he told the men, there is grave doubt that any such statement was made. Nevertheless, appellant must concede that a jury could have found that Morgan had told his crew this.

However, no jury question can conceivably be raised by this testimony as to the negligence of Clinton. The only way in which Clinton could be responsible for the misleading information is if Clinton had misled Morgan. There is not a word in the record to indicate that Clinton ever stated that the bus bar was the only danger. Appellee would have the Court believe that repeated warnings about the bus bar created such a belief in Morgan's mind. However, Mr. Morgan's testimony indicates that he received only one warning about the bus bar, and that warning was prior to the digging of the ditch.

Irrespective of whether Clinton's statements about the bus bar **could** have misled Mr. Morgan, it is obvious that they **did not.** Morgan testified "I personally knew that these transformers were hot" (Record p. 20). He further testified "I told them they (the wires) were hot and the transformers were all hot" (Record p. 21).

It is obvious that Morgan was not misled by the warning he received about the bus bar. If, as Mr. Owen testified, he misled the men, it was the negligence of appellee's employer, Pittsburgh, and such negligence is in no way attributable to Clinton.

(Significance of Insulation on Lead-in Wire eliminated as dealing with a matter not now under consideration.)

CONCLUSION.

Appellant points out that the matters raised by the Petition for Rehearing relate solely to the knowledge of the appellee himself. We wish to emphasize the fact that we also contend that the positive knowledge of appellee's foreman, Mr. Morgan, which knowledge is undisputed, was sufficient, standing alone, to relieve appellant from any duty imposed by Iowa law.

For all of the reasons urged throughout the course of this appeal, appellant respectfully contends that the judgment in favor of appellee should be reversed.

Respectfully submitted,

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APPELLANT'S BRIEF AND ARGUMENT

In Reply to Supplemental Brief and Argument.

(Foreword eliminated as dealing with matters not now under consideration.)

DISCUSSION OF AUTHORITIES CITED BY APPELLEE.

The cited and quoted sections of Restatement of the Law of Torts constitute general rules as derived from the decisions of many courts. The Iowa law is stated in **Gowing**

v. Henry Field, 225 Iowa 729, 281 N. W. 281, and is limited to warning of the dangers if warning be necessary. This rule was reaffirmed by the Iowa Court in **Atherton v. Hoenig's Grocery** (Iowa, 1957), 86 N. W. 2d 252.

Appellee cites authority for the proposition that the kind of warning and its adequacy are to be determined by the circumstances of the moment, changing as the circumstances change. Had Clinton done something during the course of the project to increase or change the danger to appellee, perhaps it would have been bound to warn him. However, any change was wrought by appellee's employer.

For purposes of drawing an analogy, let us assume that a specific warning had been given as to the very wire by which Mr. Youngs was injured. Does the action of Pittsburgh, his employer, in bringing him closer to the wire, constitute such a change as to make it incumbent upon Clinton to warn further?

If a man standing on the ground were warned that the tenth rung of a ladder is weak and the person whose duty it is to warn discovers that another rung is also weak, he must warn of the additional peril. Does he, however, have to warn again because the man has climbed to the sixth rung and is therefore closer to the original danger? If the warning was originally adequate no repetition of it can serve any purpose.

ARGUMENT.

Appellant Was Under No Duty to Warn.

Appellee states that we have conceded a duty to warn. This is not true. We have merely urged that if neither the appellee nor his employer was aware of the danger and the duty to warn therefore arose, it was discharged. We contend, and have throughout this appeal, that no duty to warn was ever imposed.

Mr. Youngs was admittedly aware that the enclosure in which he was working contained 13,200 volts. He recognized the transformers as such and knew that they must have been equipped with lead in wires. It is inconceivable that he could fail to recognize the wire in question as such. He contends that a lead in wire should be bare. However, there were no bare wires, so it must have been obvious that these transformers had no bare lead in wires. He had had far more experience in transformer areas than has the average person. What could the wire which injured him have been if not a lead in wire? If it was not, where was the lead in wire? The only wire which could be the lead in to the particular transformer was the wire involved.

His other reason for disclaiming any knowledge of the danger presented is that high voltage wires are commonly out of reach. Mr. Youngs knew that the wires were all out of reach until such time as the dirt was piled against the transformer base and he knew that Pittsburgh had piled it there. If he attributes such significance to the position of the wire in determining potential danger, he certainly should have been suspicious of the one which injured him.

There can be no question as to whether Mr. Morgan knew. His testimony, to which we have on several occasions alluded, proves to a certainty that he knew the wires were hot. Whether or not the insulation misled Mr. Youngs, it did not mislead Mr. Morgan.

That being the case, no duty to warn ever arose. We have cited authority for the proposition that knowledge of, or warning to, the employer, is a complete defense to this cause of action.

If **either** Mr. Youngs **or** Mr. Morgan knew of the danger, appellant was not bound to warn of it.

The Warnings Given Were Adequate.

Appellee dismisses a warning that the area was "hot" as meaningless because any voltage in the area would be sufficient to render it "hot". If this argument were sound, a warning to a furnace repairman that a basement contains hot wires could be disregarded. Does a home owner customarily warn his guests that there are hot wires and outlets in his living room? If he so warns them are they justified in assuming that such wires and outlets are not dangerous? Any person warned of the existence of hot wires knows beyond question that he is being warned of **dangerous** wires and, if he has been warned that an enclosure carries 13,200 volts, he certainly cannot assume that a warning that the whole area is hot means only that there is some electrical energy present.

It is contended that the concrete base and the transformers themselves were not hot and therefore a warning that the entire area was hot was insufficient. Let us be realistic about what Mr. Youngs must have understood from this warning. Can the Court believe that even a child would be misled by this warning? Had Mr. Youngs been informed that part of the enclosure was hot, we would have a different situation. He was informed and his employer was informed that it was all hot. This meant that the items which **might** be hot, not the casings or the concrete base but any wires or bus bars, were hot and they **all were.**

Appellee argues that the particular wire and the bus bar were the only hazards but this is not the fact—See

Shannon's testimony (Record p. 9). Actually the warning was better than pointing out the specific hot wires would have been because, had the latter course been adopted, and had one wire been overlooked, a person injured by that wire would have just ground to complain. If an entire shipment of medicine contains poison, is it not at least as effective to say "the whole shipment contains poison" as to point to each bottle and say "the liquid in that bottle contains poison?" Surely, no one receiving the former warning would consider the freight car, the cases, or the exteriors of the bottles and caps as dangerous, but everyone would be aware of the true situation.

Assuming a warning to have been necessary, the effectiveness of that warning must be judged by whether it apprised Pittsburgh of the danger. Even if, as an abstract matter, it would not have been reasonably calculated to do so, that fact would be immaterial. The injury to Mr. Youngs does not negative the fact of adequate warning. If the specific wire had been pointed out to him he might still have been injured by it. After all, this is not a case involving one who deliberately grabbed a wire. If it were, appellee would have been precluded from recovery by his own negligence. He inadvertently backed up close to the wire and it was closer than he thought when he turned to walk toward the pump house. This could well have happened no matter how explicit the warning.

The record discloses that the warning did alert Mr. Morgan to the danger. He was not misled by the alleged generality of it nor by warnings as to the bus bar. He **knew** of the danger from the wires. The warnings served their calculated purpose insofar as he was concerned. How then can it be contended that they were inadequate?

Appellee persists in harking back to the bus bar warnings. It is urged that "Mr. Shannon's bus bar warnings were prolific and continuous from the time work started

in the area until the injury." The record cannot conceivably be so construed. If they were, whom did he warn? Certainly not any member of appellee's crew, and certainly not the appellee himself who never heard Shannon mention the bus bar.

Mr. Shannon obviously warned the ditch digging crew members, and them alone. The reason is obvious. They had raised the ground level in a narrow areaway and were walking past the bus bar with shovels of dirt. The entire width of that areaway was less than the nearest edge of the ditch was from the lead in wire. He never warned the pipe fitters about the bus bar. As argued, they were not close to it and appellee never even saw it.

If the pipe fitters were warned about the bus bar, the warning came from their foreman who had received only one warning about it and that in connection with his direction of the ditch diggers. If Mr. Owen was led to believe that the bus bar was the only danger, he was misinformed by his foreman who **knew** of the danger of the wires.

Finally, in discussing adequacy of the warning, we wish to discuss Mr. Youngs' disclaimer of any awareness of the danger. The mere denial that he was aware of it does not create a jury question. Suppose Mr. Youngs had been told that the wire contained 13,200 volts but testified that he did not know that such a voltage would hurt him. Under appellee's apparent theory, it would have been the province of a jury to determine whether he had been adequately warned. Certainly the rule that the evidence must be considered in the light most favorable to the plaintiff could not be perverted to that extent. We cannot conceive that the Court can entertain any serious doubt as to whether Mr. Youngs was aware of the danger.

Pittsburgh Was Negligent in Performing Its Duties Owed Appellee.

Despite appellee's contention that control of the job was in Clinton, the record discloses that Pittsburgh was responsible for labor, materials, tools, supervision and methods in the performance of the contract (Record pp. 33 and 34).

Who was responsible for Mr. Youngs' injury? The answer to that question lies in the answers to the following questions:

1. Was Mr. Youngs misled?
2. If so, who misled him?
3. Who brought him into proximity to the wire?

We feel that the first of these questions has been answered. Appellee had worked on an 11-month project at a power plant of Iowa-Illinois Gas & Electric. He was not an electrician but had far greater than average knowledge of transformers and their connections. He knew a bus bar when he saw one. He knew a lead in was necessary. He saw signs warning of the voltage on the fences and telephone poles. The evidence discloses that a pole bearing such a sign was at the very edge of the ditch near the transformer bank and had to be cabled to keep it from sliding in. This pole appears in Exhibit 4. Mr. Shannon testified that according to his recollection there was a sign on the base of the transformer bank (Record p. 13). He further testified that he cautioned the men every day that the transformers were hot. Every warning from Clinton indicated danger around **every** transformer connection. At the very least he knew that there were wires containing 13,200 volts and that these wires were insulated, and there was no basis from any act of Clinton which would warrant him in ignoring the danger lurking in the wire which injured him.

If he was misled by the nature of any warnings, they must have come from his foreman or fellow workmen. The bus bar warning to him certainly did not come from Clinton. Mr. Morgan told the men about the bus bar but he knew the wires were hot and the transformers were hot. He further knew that the work of the pipe fitters would not take them close to the bus bar. If he misled his crew it was purely of his own volition and despite his knowledge of the situation.

At this point we digress to discuss the import of the words, "hot transformers." Appellee apparently feels that this was misleading because parts of the transformers were not hot. Certainly, such a quibble over terms cannot be taken seriously. The import of the words was obviously that they were hot at the places that hot transformers are dangerous, just as an electrician in indicating a fuse box will say "that box is hot." He doesn't mean that the door can't be opened or, indeed, that a fuse cannot be removed. He means that energy is flowing to it in the commonly dangerous areas, it is dangerous.

Thus, when Mr. Shannon warned daily that the transformers were hot and when Mr. Morgan testified that "I personally knew these transformers were hot" (Record p. 20), the former warned of, and the latter understood, the condition precisely as it existed at all times during the progress of the work.

As to the third question, let us consider the position of appellee's employer, Pittsburgh. It had absolute knowledge of the danger involved in the lead in wire. It had absolute control of methods, tools, labor and supervision. Above all it, and it alone, had the absolute duty to provide a safe place for its employees.

Despite its knowledge and despite its control over methods, Pittsburgh caused the ditch to be laid out by Mr. Morgan and excavated by its crew, and permitted that

crew to pile the dirt at such a point that the men could reach the lead in wire which they could not otherwise have reached.

Pittsburgh decided that the pipe should be drifted in with a chain and, to that end, placed the plank, the end of which rested upon the transformer base. This it did despite Mr. Morgan's testimony that **"we usually use a crane but we didn't have any"** (Record, p. 16).

Pittsburgh not only failed to provide a safe place to work, but took its men **from** a safe place to work to a place of danger. It is not, as appellee has heretofore contended, a matter of Clinton's having delegated these matters. It was Pittsburgh's province to excavate the ditch, pile the dirt where it wished and use a chain to swing the pipe in, and Clinton did not, and could not under the contract, supervise these matters. It was Pittsburgh's duty to provide a safe place to work and **Clinton had no such duty.**

Has the primary question not been answered? Is it not obvious that Pittsburgh was **solely** responsible for bringing appellee into the danger zone and solely responsible for misleading him if he was misled?

Pittsburgh's Knowledge Precludes Recovery by the Appellee.

For the purpose of this case it matters not whether Mr. Morgan's knowledge was derived from Clinton's warnings or independently thereof.

As we have consistently urged, if Pittsburgh was aware of the danger, the only duty which could have been imposed upon Clinton by Iowa law never arose.

Appellee has endeavored to answer this contention by the claim that the knowledge never reached Mr. Youngs. That is beside the point. The knowledge of Pittsburgh is a defense to Clinton whether or not appellee had knowl-

edge. It will be noted that in **Engle v. Reider**, 366 Pa. 411, 77 A. 2d 521, there was admittedly no warning to the victim.

This position is demonstrated by the decisions involving lease arrangements, one of which is Willis v. Snyder, 190 Iowa 248, 180 N. W. 290. The Iowa decisions have been based purely upon whether the lessee was aware of the danger and have generally involved plaintiffs who had absolutely no knowledge of the danger. In short, the question is not "Did the injured party know," but "Was the lessee aware, either by, or independently of, warning!"

The distinction is made by the Iowa Court in **Atherton v. Hoenig's Grocery** (Iowa 1957), 86 N. W. 2d 252, wherein it said:

> "It must be kept in mind that we are discussing the question of the negligence of the defendants rather than contributory negligence of, or assumption of risk by, the plaintiff."
>
> • • • • • • •
>
> "But we are not here concerned with contributory negligence or assumption of risk; rather with the **primary negligence of the defendants.** The Possessor of real estate is **not an insurer** of the safety of those who come upon his premises by invitation, express or implied. Negligence is predicated upon an unperformed duty. The duty owed by the inviter is to those, and to those only, who do not know, or, in the exercise of reasonable care for their own safety, have no reasonable means of knowing, of defects or dangers. He may avoid liability in two ways: by, making and keeping his lands safe, or **by warning of the dangers.**" (Emphasis supplied.)

It is clear that if the possessor of real estate performs his duty, he cannot be held liable, because he has not been negligent and is not an insurer.

The duty of the contractor to control, advise and, if necessary, warn his employees is consistently recognized by contractors and those who deal with them. Were it otherwise, a property owner could never feel secure in the knowledge that he had discharged his duty to warn. Suppose Mr. Shannon had discovered that the pipe was not following the line called for in the plan. Would he complain, or explain, to Mr. Youngs, Mr. Owen or Mr. Sullivan? Of course not. He would talk to Mr. Morgan who would order the men to correct the deviation from the plan.

Indicative of the situation and Mr. Youngs' understanding of it is his testimony relative to the bus bar warning he received:

> "Either Mr. Morgan or Mr. Owen made the statement about the bus bar, **because Mr. Morgan was foreman of the job. He naturally was the fellow who gave us all our orders** and Mr. Owen was, at that time, more or less his right-hand man on the job. **Any warnings would have to come from one or the other of those men**" (Record, p. 31).

Appellee, in his Supplemental Brief and Argument, says that appellant had assumed the duty of warning the men or at least the men could so believe. We fail to see how appellee could so believe because, according to him, he had **never** had **any** conversations with **any** of Clinton's personnel about hazards. He had seen Mr. Shannon only twice in five weeks on the job and then in areas other than that involved and "on neither occasion was comment made about the area" (Record, p. 30).

CONCLUSION.

We contend that appellant's only duty under Iowa law was to warn if the danger was unknown both to appellee and his employer.

We submit that the warnings given were adequate. They certainly apprised the foreman, Mr. Morgan, of the situation. The warnings certainly did not mislead Mr. Youngs, because he denied ever having discussed the matter with any employee of Clinton. He was taken into the zone of danger by his employer and, if he was lulled into a feeling of security, it was his employer who did it.

We respectfully urge that the original judgment of this court reversing the judgment below was right and should be reinstated.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,887.

CLINTON FOODS, INC., a Delaware Corporation,
Appellant,

vs.

MARVIN A. YOUNGS,
Appellee.

PETITION FOR REHEARING.

STATEMENT OF GROUNDS.

The appellant respectfully requests the Court to grant a rehearing of its appeal and assigns the following grounds therefor:

I.

The majority opinion indicates that the judges joining therein misconstrued the Record as to certain elements of fact.

II.

The majority opinion cites a number of cases which were not cited nor argued on the appeal but which had been so thoroughly distinguished in the briefs at the hearing on the motion that plaintiff had abandoned them, and which can be distinguished from the case involved herein.

III.

The majority opinion fails to recognize the knowledge of appellee's employer and the legal proposition that such knowledge provides a conclusive defense.

Where we refer herein to "the opinion," we have reference to the majority opinion written by Judge Matthes. To avoid confusion we will refer to appellant and appellee as defendant and plaintiff, respectively.

(I and II eliminated as dealing with matters not now under consideration.)

III.

The Majority Opinion Fails to Recognize the Knowledge of Appellee's Employer and the Legal Proposition That Such Knowledge Provides a Conclusive Defense.

The statement on page 11 of the opinion that defendant's position is two-fold, followed by setting out two of the points which we raised on appeal, would indicate that these were the only contentions presented. We believe that one of the omitted points constitutes a complete defense, as a matter of law. We refer to Point II, subdivision (3), argued on pages 26-34 of our original brief. This point dealt with the knowledge of plaintiff's employer. Pittsburgh was aware of the danger in the specific instrumentality which injured plaintiff and no jury could have found otherwise.

If this Court refuses to recognize the validity of this defense, we sincerely believe that it should say so. It would seem only fair that those who, in the future, engage independent contractors, be informed, before reaching an appellate court, that they can no longer rely upon the custom which invariably prevails among independent contractors and those who contract with them; the language of Sec. 979 of White's Supplement to Thompson on Negligence which purports to state the rule; the doctrine announced by the Supreme Court of Pennsylvania in **Engle v. Reider**, 77 A. 2d 621, and the holding in **American District Telegraph Co. v. Kittelson**, 179 F. 2nd 946, cited on

this point on page 34 of our original brief, in which Judge Graven's instruction that "* * * if you find that the condition * * * did present a hidden defect, danger, or pitfall to persons using thereof, and * * *, then the failure to warn the defendant or its employees of such hidden defect, danger, or pitfall constituted negligence * * *", was objected to, not by the defendant, but by one who stood in the shoes of the plaintiff, and was approved by this Court which said, "The Iowa cases support the charge."

It is with mixed emotions that we invite the Court to pass specifically on this point. In our judgment it will be a sad day for our economy should this Court, or any Court, construe the law to require that those who contemplate projects such as this defendant undertook, inform, at their peril, every employee whom the independent contractor may, from day to day or hour to hour, bring on the job, of dangers of which he knows the contractor to be aware, and be able to present conclusive evidence that they have done so. However, it will be a far sadder day in the history of our jurisprudence if a litigant can justifiably say that he sought the judgment of the Court and was denied determination of a basic and decisive question.

We realize that there are many cases in which courts can properly reach decisions without passing upon all of the points raised by the loser. A litigant has no right to insist that a court express its views on a point made by him if other points require a decision against him. On the other hand, if there remains a question of law which, if resolved as he contends, would be decisive in his favor, he is entitled to have it passed upon. Any decision which ignores it denies him his day in court as effectively as though the court had refused to hear him at all.

We insist that the latter situation obtains here. We recognize that a close question exists as to whether the plaintiff, personally, knew or was warned of the danger

as a matter of law, and, though we believe he was aware, we could accept an adverse decision on these points gracefully. However, the contention which we have urged most strongly throughout the appeal, and on which we have placed our greatest reliance, has not been passed upon. Had we not urged the other points but relied only upon Pittsburgh's knowledge, the Court would have been obliged to pass upon the contention. Surely the Court will not refuse to do so because we did not so limit the appeal and, in the interest of our client, presented other contentions as to which we, in good faith though perhaps mistakenly, felt it should prevail.

If it is the law that the duty to warn is discharged by warning the contractor or that no warning is necessary where the contractor is aware of the danger, then defendant was entitled to a directed verdict. If it is the law that, irrespective of the contractor's knowledge, the owner must see that all of the contractor's employees are warned, then (assuming the majority to be correct in its decision as to the other points) the verdict should stand.

In the case at bar, the Court has failed to decide a point which, if decided in accordance with our contention, required a directed verdict even though every other point was properly decided in favor of the plaintiff.

If it was for the jury to say whether plaintiff had been adequately warned and whether he knew or in the exercise of reasonable care should have known of the danger, he is nevertheless barred from recovery against Clinton if Pittsburgh's knowledge relieved Clinton from the duty imposed under the doctrine of **Gowing v. Henry Field.** If the Court has correctly held that the giving of specific warnings as to the bus bar rendered the general warnings inadequate and misleading so far as plaintiff and other crew members are concerned, no such question of adequacy exists in respect of the knowledge of his employer.

Morgan was Pittsburgh. He testified unequivocally that he had knowledge that the danger was not limited to the bus bar or the corrugated transformers; that he knew the whole area was hot and that the wires were hot.

We contend that this relieved Clinton of all affirmative obligation and there is no basis for recovery.

We respectfully submit that the majority has either overlooked our contention as to the sufficiency of the employer's knowledge, or that it has failed to appreciate the fact that its interpretation of the Record and of the inferences which a jury would be justified in drawing did not dispose of that contention.

Perhaps reasonable minds might differ as to what the plaintiff heard or what he knew or should have known. They could not differ as to what Morgan **knew**. That being so, and plaintiff did not urge to the contrary, the right of plaintiff to a verdict depends squarely upon a question of law which the Court has not passed upon.

We respectfully urge the Court to reconsider its decision and grant a rehearing.

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COOK, BLAIR, BALLUFF,
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Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is submitted in good faith and that we believe it to be meritorious.

Craig Cook,
Wayne G. Cook,
Attorneys for Appellant.

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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 217

CLINTON FOODS, INC., a Delaware Corporation,
Petitioner,

v.

MARVIN YOUNGS,
Respondent.

STATEMENT IN RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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v.

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Respondent.

STATEMENT IN RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Respondent resists the petition filed herein.

QUESTIONS PRESENTED.

Petitioner on page 3 of its petition states two questions: One, whether the Court of Appeals can ignore a contention otherwise determinative of a litigant's right to reversal; and the other, whether failure so to do is a denial of due process. Respondent submits upon the record that the Circuit Court of Appeals has not ignored in the slightest degree petitioner's contention. On the contrary, we shall show by reference to the opinion below and by a brief reference to certain of the facts that petitioner's claimed defense has been fully considered and has been definitely, but adversely, adjudicated.

STATEMENT.

A review of the entire record is obviously out of place at this juncture. Such facts as are relevant to the point presently under consideration concern themselves only with the question of whether the warning of an undisclosed and obscured peril to either the employer of respondent or to respondent himself was adequate to exonerate defendant from liability to plaintiff as an invitee. The warning contended for as being adequate was the placement of a sign, "Danger 13,200 volts," at one or two places in or near an enclosure of electrical transformers, coupled with a statement that the transformers were activated—that is to say, "hot." This was urged as a sufficient warning to apprise either the employer or the respondent of the lethal character of an apparently insulated wire. The use of insulated wire for the lead-in wire in question was admittedly abnormal and deceptive.

A warning is not adequate unless commensurate with the danger. It may not be self-contradictory. It may not confuse or mislead. It must be timely.

The sufficiency of the warning was also to be considered in the light of the further fact that the defendant was at all times during the progress of the work, at which respondent was employed, in active supervision of that work and frequently calling attention to the presence of an exposed bus bar, some distance removed from plaintiff's work, but making no reference to the apparently insulated lead-in wire, crucially adjacent to plaintiff's work.

The precise question before the Circuit Court of Appeals was whether there was a jury question as to the sufficiency of the warning in the light of these circumstances. This case has been argued now three times before the Circuit Court of Appeals—once before each of two separate panels and once before the Court sitting en banc. It would be a

singular situation indeed if any contention made by either litigant has been overlooked by that Court. Petitioner, fearing lest this court will think this matter has not been sensibly presented to the attention of the Court of Appeals, appends his several arguments heretofore made on these different occasions. Partisan as they may be, it is our opinion that a reading of the arguments will definitely indicate the question to have been one of fact and to have been correctly so recognized by the appellate court.

REASONS FOR NOT GRANTING THE WRIT.

1. Petitioner has been accorded a determination of the precise point of law urged so far as material to the decision of this case.

2. This is a fact case and the interest of the public in the consequences of the decision is relatively non-existent.

Petitioner continuously argued that a warning to the employer served to relieve it of further responsibility. It is the evident opinion of the court that a warning, to have any legal significance, must obviously be adequate to serve the purpose and fulfill the duty curtailed by the circumstances. Petitioner must agree that a warning to the employer must be as adequate as any warning given to the plaintiff. Adequacy, as we have said, must be measured in the light of the surrounding circumstances.

The fundamental error of petitioner is in seeking to contend that the position of the sign, "Danger 13,200 volts," and the statement that the transformers were "hot"—(that is to say, "activated")—completely covered the situation and constituted a defense regardless of all other facts in the case. As to this we quote the following from the opinion of the Circuit Court on page 21 in the appendix to the petition:

> "Defendant's position is two-fold. First, it is urged that because plaintiff was aware that the enclosure in

which he and others were working contained 13,200 volt equipment, coupled with his general knowledge that transformers are used to conduct electricity, completely relieved defendant of the duty to give any warning of the danger in and about the emergency transformers. Second, it is said that the warnings imparted by the signs bearing the legend 'Danger 13,200 volts,' coupled with the verbal statements made from time to time that the area was 'hot,' completely satisfied any legal obligation with respect to warning so as to remove that issue, as a matter of law, from the case. We are not persuaded to accept either contention."

The opinion of the court then proceeds to a realistic consideration of the effect attributed to these signs and so-called warning that these transformers were "hot". Perhaps the most direct way of meeting petitioner's contention will be by quoting the concluding portion of the opinion of the Court of Appeals:

"Reviewing the case in the most favorable light, we find that while there was evidence that knowledge had been imparted to employees of Pittsburgh that the enclosed area was 'hot,' logically, it can hardly be urged that the entire area was literally charged with electricity, or that Pittsburgh's employees should believe it to be so. Indeed, defendant itself recognized that such was not the situation, for it prepared the plans whereby it became necessary to lay the water main through the area. By so doing, and by directing a specific warning only to the open, uncased, corrugated transformers and the 440-volt bus bar adjacent thereto, the jury could properly find that, implicit in defendant's 'invitation' to work within the area was the representation that the area was relatively safe, except around the dangerous instrumentality; i. e., the uncased transformers and bus bar. That the entire

area was not virtually a 'chamber of horrors' is borne out by defendant's conduct during the course of the pipe installation. Although defendant must be charged with knowledge of the dangerous character of the lead-in wire which injured plaintiff, all specific warnings were directed solely to the uncased transformers. Through its representative who was supervising the installation, the defendant repeatedly warned Pittsburgh employees of the danger that lurked in and about the bus bar and corrugated transformers. They were told '(n)ow, you are getting where that is dangerous. You can walk into that, and if you do it will bite. In that situation I specifically pointed out the bus bar because they had piled the dirt so high you could walk right into it.' But there the verbal warning stopped. There is credible evidence from which a jury could properly find that at no time was there any warning given that inasmuch as the lead-in wire carried as much as 13,000 volts, it was even more dangerous to work in close proximity to this wire. Surely defendant was fully aware that work was progressing in the immediate vicinity of the emergency transformers. Defendant's supervisor, Mr. Shannon, testified, 'I had been there within a few minutes before the accident. I had just left when the accident happened.' But he gave no warning of the impending danger, at least there is evidence that he did not. Nor are we justified in holding that, apart from any oral warnings, plaintiff's knowledge, as a reasonable man, concerning the dangerous character of electrical equipment generally, would bar him from recovery as a matter of law. That the dangerous object which caused the havoc to plaintiff was neither open nor obvious is scarcely debatable for as we have seen, the offending device (the lead-in wire), was covered with insulation, and this, together with the fact that all specific warnings were directed to the

> 440-volt bus bar, could have the conceivable effect of lulling a reasonably prudent person into a sense of safety. But the insulation was not intended nor designed to render the wire harmless if contact therewith was made. In the words of defendant's Mr. Shannon: 'It isn't customary to insulate that tension of wire and wasn't put there for insulation purpose. Normally that wire would be bare because for purposes of insulation, that insulation was absolutely worthless—might just as well not be there.'
>
> "We have indulged in an exhaustive review of the facts, and have carefully studied decisions of the Iowa courts bearing upon our factual situation. As previously discussed, the particularly dangerous element of electricity here involved is a circumstance properly to be considered by a jury in determining whether defendant has exercised ordinary care. Here, there was evidence from which a jury could justifiably find that the wire which injured plaintiff constituted a latent danger; that this danger was known to defendant; that plaintiff did not have actual knowledge thereof and in the exercise of ordinary care on his part would not have discovered the same; and that, under the circumstances, the warning given by defendant was inadequate."

It surely must be evident that the court was fully apprised of petitioner's contentions, that the court gave them extensive consideration and that the court did not misinterpret, misapply or for that matter ignore any applicable Iowa law. Implicit in the court's opinion is the thought that whatever might be the result of an adequate warning to the employer is immaterial and irrelevant to the issue here for the reason that under the facts the so-called warning was inadequate. In plain terms measured in the light of all the circumstances shown in this record, what was said and done did not constitute, as a matter of

law, such a warning as must be said to be a complete avoidance of further responsibility by the petitioner. Nothing in the Iowa cases cited by petitioner expresses any rule of law with which the opinion of the Circuit Court of Appeals is not in perfect harmony nor which it ignores.

It is respectfully submitted that the petition should be denied.

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IN THE

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OCTOBER TERM, 1959.

No. 217.

CLINTON FOODS, INC., a Delaware Corporation,
Petitioner,

v.

MARVIN YOUNGS,
Respondent.

REPLY TO RESPONDENT'S STATEMENT IN RESISTANCE.

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IN THE

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OCTOBER TERM, 1959.

No. 217.

CLINTON FOODS, INC., a Delaware Corporation,
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REPLY TO RESPONDENT'S STATEMENT IN RESISTANCE.

FOREWORD.

Petitioner feels that respondent's Statement in Resistance fails to respond to the issue which we attempted to state in our Petition. Rather it constitutes an attempt to evade the issue here involved by continuing the method practiced throughout the appeal of misstating, by abridging, the petitioner's contentions, and asking that the matter be determined upon the limited issue of the nature of the warning given and the claim that the warnings were inadequate in

that they were not received by respondent personally and were not specific enough to warn respondent personally. The phases of the issue here presented: as to whether the foreman knew of the danger independent of warnings, and whether the warnings, if necessary, were received and appreciated by the foreman, are completely ignored as they have been heretofore by respondent and by the Court of Appeals.

We shall, herein, endeavor to reply to respondent's divisions denominated, respectively, "Statement" and "Reasons for Not Granting the Writ."

REPLY TO STATEMENT.

In the division entitled Statement, the respondent discusses the question of adequacy of any warnings and sets up certain standards which, he asserts, are requisites of a warning.

We cannot quarrel with the standards thus set up, as an abstract proposition. However, the issue presented in our Petition is based not upon the specific warning or any magic words thereof which qualify it as adequate, but upon a number of warnings of diverse character which were received by the employer through its foreman, Mr. Morgan, and the fact that they were sufficient as Morgan's testimony discloses. If they were not, it is clear that no duty to warn was imposed, because, from some source, Morgan was unquestionably aware of the danger.

Mr. Morgan testified that "I personally knew that these transformers were hot" (R. page 20), and acknowledged recalling that in a prior deposition he had responded to a question "Did you have any conversation with your men about the **wires**?" by reply, "I told them they were hot and the transformers were all hot" (R. page 21). It is certain that Morgan was aware of the very danger which

caused respondent's injuries, and it matters not whether he was aware because of, despite, or independently of, the warnings. Therefore, whether the warnings were such that they would have apprised someone other than Morgan of the danger is immaterial. Either they accomplished their purpose or they were unnecessary.

Petitioner was not "in active supervision of that work" at all times, as alleged, except to the extent indicated by the testimony of its employee, Shannon, that it was his "particular job to see that the pipeline was **in accordance with specifications**" (R. page 10). That is the traditional supervision reserved by anyone who engages a contractor. That there was no supervision over either methods or employees is shown by the stipulations "that under the contract between Clinton Foods, Inc., and Pittsburgh Piping and Equipment Company under which the plaintiff was performing work, Pittsburgh Piping and Equipment Company occupied the status of an independent contractor" (R. page 33), and that Pittsburgh, in connection with the work, "shall furnish all labor and materials, tools, supervision and methods as outlined in the specifications equipment and transportation necessary for the proper execution of the work" (R. pages 33-34).

It is not only untrue that petitioner was "frequently calling attention to the presence of an exposed bus bar" throughout the progress of the work, as alleged, but the record shows clearly that **no** representative of petitioner warned **any** employee of Pittsburgh of the bus bar during the time respondent was in the area, and **no** employee of petitioner **ever** warned respondent about the bus bar. The references to the record which support the latter assertions appear on pages 104, 105, 106 and 107 of the Appendix to our Petition.

Respondent apparently likens the decision of the Court of Appeals to a jury verdict; and takes the position that if

an issue has been raised, it must have been considered. Unlike a jury verdict, the "decision" is supported by an opinion. There is no basis for a presumption similar to that indulged as to what inheres in a verdict, because the opinion speaks for itself as to what has been considered.

REPLY TO REASONS FOR NOT GRANTING THE WRIT.

Both of the numbered reasons, **if correct**, would be valid reasons for not granting the writ. We submit that they do not accord with the true situation.

Understandably, respondent adopts the Court's expressed view of the nature, and limit, of our contentions. The pronouncement of this view is precisely the point upon which we base our petition. We consistently and repeatedly, at every opportunity, raised the issue of the contractor's knowledge and the legal effect thereof. Ours was never a "two-fold" position. It is true that respondent adopted an ostrich-like approach to the issue which is now the only one involved by neither answering it nor even referring to it during the appeal, and apparently hoped that by pretending that it did not exist, it would go away. We seek the review of this Court because apparently that's precisely what it did.

The majority opinion (page 15 of the Appendix, page 92 of the Transcript of Record) holds that "the crucial question is—Do the facts establish, as a matter of law, that **plaintiff** was adequately warned or was aware of the dangerous instrumentality which caused his injury, or in the exercise of ordinary care **on his part**, could **he** have discovered such danger?" (emphasis supplied). The majority further held (page 22 of the Appendix, page 95 of the Transcript of Record) that plaintiff's knowledge, as a reasonable man, would not, as a matter of law, bar his recovery. Finally (page 23 of the Appendix, page 96 of the

Transcript of Record), the majority held that the jury could reasonably have found "that plaintiff did not have **actual knowledge**" (emphasis supplied).

We submit that these statements, coupled with the incorrect and misleading reference as to petitioner's "two-fold" position and the complete failure to mention either the facts, or the contentions, as to what Morgan or Pittsburgh knew, show conclusively that we have not been accorded determination of the decisive point of law urged.

Assuming that we have established that position, reason numbered 2 is based upon a false premise. This is not, so far as material hereto, a fact case. Rather it is a case wherein the Court of Appeals—by default as it were—has rendered an opinion which is misleading as to the validity of a legal defense, because it fails to apprise the public of its refusal to accept a rule which is generally accepted. We submit that the public interest is apparent.

CONCLUSION.

For the reasons stated in our Petition, and in light of respondent's failure to adequately answer them, we pray the issuance of a writ.

Respectfully submitted,

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